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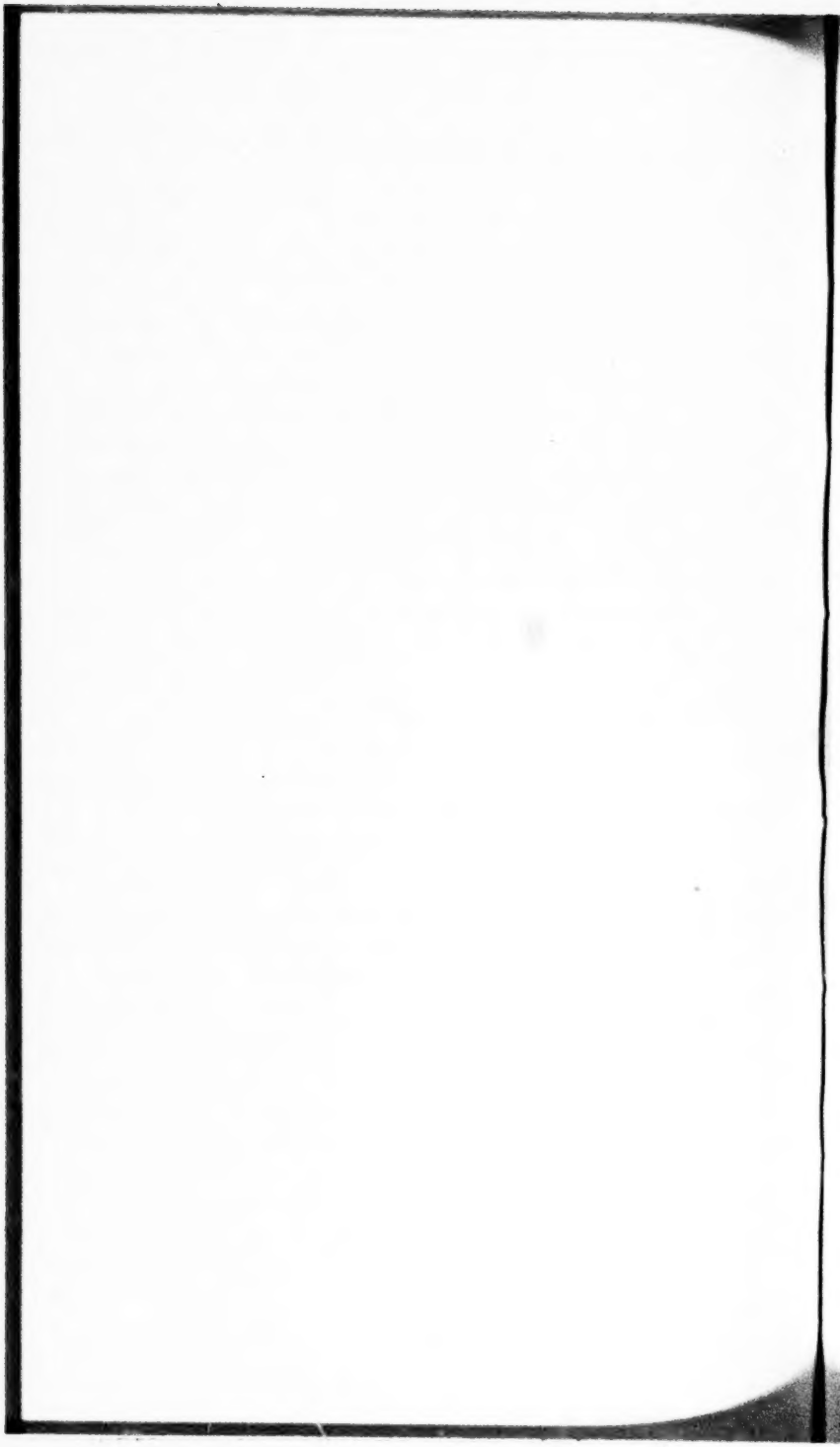

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO.

J. ROBERT HUIE,
Petitioner

vs.

BOARD OF COMMISSIONERS OF THE
ALABAMA STATE BAR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your peitioner, J. ROBERT HUIE, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the Supreme Court of Alabama rendered on the 8th of January, 1970, which affirmed the disbarment of petitioner by the Board of Commissioners of the Alabama State Bar on the 3rd of March, 1967.

A timely application for rehearing in the Supreme Court of Alabama was denied, without opinion, on the 5th of February, 1970.

OPINION BELOW

The opinion of the Supreme Court of Alabama has been reported at 230 So2d 514, under the title: *In the Matter of J. Robert Huie.*

A copy of this opinion is attached hereto in Appendix A, *infra*, pp. A1 thru A 11.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on the 8th of January, 1970, and is annexed hereto in

Appendix A, *infra*, p. A 12.

A timely petition for rehearing was denied on the 5th of February, 1970, and the judgment of the Supreme Court of Alabama thereon is in Appendix A, *infra*, p. 13.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment in question is 28 U.S. Code, Section 1257(3).

QUESTION PRESENTED FOR REVIEW

Whether or not the totality of procedures prescribed and followed in Alabama from the inception to the termination of a disciplinary proceeding against an attorney, and wherein the Board of Commissioners of the Alabama State Bar formulated a rule of ethical conduct, and then proceeded to act, directly or indirectly, as accuser, prosecutor, judge and jury, for a violation of that rule, are consistent with that due process guaranteed by the Fourteenth Amendment, United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes, and rules involved are set forth in Appendix B, pp. B1 *et seq, infra.*

STATEMENT OF THE CASE

This disciplinary proceeding against petitioner J. ROBERT HUIE, as a licensed attorney of Alabama, has been in progress formally for almost six years.

On or about the 20th of May, 1964, the Grievance Committee of the Alabama State Bar filed four charges (R. pp. 7 thru 20) against J. ROBERT HUIE alleging certain enumerated violations of Rules 25 and 36, Section A, as last amended, Rules Governing the Conduct of All Persons Admitted to the Practice of Law in the State of Alabama (Appendix B, *infra*, pp. B 6 thru B 7).

Succinctly stated, Rule 25, Section A, as last amended, proscribes certain conduct by attorneys in the procurement of divorces in the courts of Alabama, with particular stress upon the existence, in fact, of the non-residency of both parties to a divorce action. Rule 36, Section A, as last amended, is that

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vague and general prohibition of "any conduct unbecoming an attorney at law."

Thereafter, the Grievance Committee added to the original complaint Charges Five and Six (R. pp. 21 thru 25), once more alleging violations of Rules 25 and 36, Section A, as last amended.

In a pleading filed the 14th of July, 1964, titled "Motion to Quash", J. ROBERT HUIE immediately attacked on federal constitutional grounds several aspects of the complaint or information and the procedures to be followed (R. pp. 30 thru 38):

> "5. For that Section A, Rule 36 of the Rules Governing the Conduct of Attorneys in Alabama, which condemns 'any conduct unbecoming an attorney at law' and makes an attorney subject to discipline therefor, fails to set up a standard of conduct reasonably ascertainable and sufficiently definite to afford a constitutional guide or standard for an attorney." (R. p. 31)
>
> * * *
>
> "18. For that Section B, Rule 18, making the 'opinion' of the Board the sole measure of the relevance, materiality or competency of testimony sets up a standard for testimony so indefinite, unascertainable and subject to change that the accused attorney is denied a trial according him due process and equal protection as guaranteed to him by the Constitutions of Alabama and of the United States." (R. pp. 33-34) (Rule 18 appears in Appendix B, *infra* p. 7).

Furthermore, in this "Motion to Quash" the following appears:

> "Accused respectfully requests a jury trial in Jefferson County, Birmingham Division, of the issues of fact presented in this case." (R. p. 38)

Thereafter, the Grievance Committee attempted to take the testimony of J. ROBERT HUIE, and upon his refusal to produce documents or to take the witness stand and testify J. ROBERT HUIE was held in continuing contempt of court. (R. pp. 54, *et seq.)*

This citation for continuing contempt was tested in the Supreme Court of Alabama, Ex parte *Huie*, 278 Ala 330, 178 So2d 156, *cert. den., Griffith, et al., v. Board of Commissioners of Alabama Bar*, 382 US 988. Upon being denied relief from the contempt ruling, J. ROBERT HUIE on the 28th of April, 1966, took the witness stand (R. pp. 64, *et seq.*, p. 79). However, on advice of counsel, J. ROBERT HUIE, refused to answer any question concerning the charges brought against him (R. pp. 81, *et seq.*).

On the 29th of April, 1966, the Grievance Committee filed additional charges SEVEN through TWELVE (R. pp. 431 thru 435). Charges SEVEN, EIGHT, and NINE, are of utmost importance since these are the three charges upon which the affirmance of the disbarment of petitioner J. ROBERT HUIE is based by the Supreme Court of Alabama:

CHARGE SEVEN
(Violation of Rule 25, Section A)

> "On, to-wit, January 27, 1965, the said attorney did submit to the Circuit Court, Tenth Judicial Circuit of Alabama, a divorce case, namely, George E. Anderson vs. Loretta A. Anderson, in Equity, Case No. 137-515, wherein the Bill of Complaint and deposition of complainant represented to the Court that the complainant was a bona fide resident of the State of Alabama, when, in truth and in fact, the said attorney knew, or had reasonable cause to believe, that neither the complainant nor the respondent was a bona fide resident of the State of Alabama.
>
> "The Grievance Committee charge that in doing the above described acts, the said attorney was guilty of violating or failing to comply with Rule 25 of Section A of the Rules Governing the Conduct of All Persons Admitted to the Practice of Law in the State of Alabama, the same having been heretofore attached to the pleadings in this cause."

Charges EIGHT and NINE allege the same facts as in violation of Rules 16 and 36, Section A (Appendix B, *infra*, p. B7).

On the 11th of March, 1966, petitioner J. ROBERT HUIE had filed an amendment to his motion to quash complaint, including the following ground, which was reassigned to the foregoing counts on the 11th of June, 1966:

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"35. For that Rule 25, Section A, as last amended, Board of Commissioners of the Alabama State Bar, is *contra* to the interpreted statutory law of the State of Alabama, particularly Title 34, Section 27 and 29, Code of Alabama, 1940, and, as a result, said Rule violates the due process clause of Article I, Section 6, Constitution of Alabama, 1901, and the due process and equal protection clauses of Amendment XIV, Constitution of the United States." (R. p. 436)

Furthermore, additional grounds in support of the motion for dismissal were added on the 19th of September, 1966:

"37. For that Section A, Rule 25, as amended, is null, void and illegal inasmuch as the BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR which promulgated such rule (to-wit: the 24th day of October, 1961) was illegally and unconstitutionally composed in violation of the due process clause of Article I, Section 6, Constitution of Alabama, 1901, and the due process and equal protection clause of Amendment XIV, Constitution of the United States in that there is an unconstitutional disparity in the number of members of the Alabama State Bar in the judicial circuits which elect the BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, a legislative, judicial and executive arm of the State of Alabama, and functioning under its sole authority.

* * *

"42. For that Section A, Rule 25, as amended, is null, void and illegal inasmuch as marriage is a civil contract only, as any other contract, and to require that a party to a divorce, or both parties, be a bona fide resident of the State of Alabama is a violation of the due process clauses of the state and federal constitutions and the equal protection clause of Amendment XIV, Constitution of the United States.

* * *

"44. For that Section A, Rule 25, as amended, is null, void and illegal in that the Supreme Court of Alabama has *held* on recent occasion in *Lutsky v. Lutsky*, 183 So2d

782 (March 3, 1966) that even though neither party to a divorce was domiciled in the State of Alabama it would not disturb the decree, thus creating such uncertainty in the law of divorce in the State of Alabama as to cause said rule to violate the rights of defendant guaranteed by the due process clauses of the state and federal constitutions and the equal protection clause of Amendment XIV, Constitution of the United States.

* * *

"46. For that Section A, Rule 25, as amended, is null, illegal and void inasmuch as marriage is a civil contract only, as any other contract, and to require that the parties to a divorce, or one of the parties, be a bona fide resident of the State of Alabama, when both parties are before the court, which court has jurisdiction of the subject matter is a violation of Amendment I, Constitution of the United States, as the same is made applicable to the State of Alabama by operation of Amendment XIV, Constitution of the United States." (R. pp. 466 thru 469)

Proceedings by way of deposition were commenced at the Jefferson County, Alabama, Court House, before a Commissioner, on the 24th of October, 1966 (R. pp. 174, *et seq.*).

Immediately, petitioner J. ROBERT HUIE interposed an objection to the commissioner based on the ground that such commissioner was a licensed, practicing attorney and a licensed member of the Alabama State Bar, concluding with the following:

"A. To allow the said TIMOTHY M. CONWAY, JR., a licensed member of the Alabama State Bar, and thereby an interested person, to take testimony would violate the rights of the said J. ROBERT HUIE to due process under Article I, Section 6, Constitution of Alabama, 1901, and Amendment XIV, Constitution of the United States." (R. p. 478)

The commissioner declined to recuse himself (R. p. 179).

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Testimony taken concerning the aforesaid Charges SEVEN, EIGHT and NINE included that of Judge Claude Hughes, one of the Circuit Judges, Tenth Judicial Circuit of Alabama (R. pp. 239, *et seq.)*, and O. H. Florence, register in chancery, Tenth Judicial Circuit of Alabama (R. pp. 245, *et seq.)* and included certain exhibits (R. pp. 299 thru 303).

Meanwhile, depositions of Loretta Anderson and Edward J. Dolan had been taken on the 30th of June, 1966, in New Brunswick, New Jersey, and petitioner J. ROBERT HUIE was forced at considerable expense to employ counsel to represent him there (R. pp. 317 *et seq.)*

J. ROBERT HUIE protected his constitutional rights in and about the use of depositions on two occasions, the first being a Motion to Suppress Depositions dated the 15th of September, 1966 (R. 465):

> "J. ROBERT HUIE, defendant, moves the BOARD OF COMMISSIONERS to suppress the depositions, separately and severally, of MRS. LORETTA ANDERSON and EDWARD J. DOLAN, heretofore filed in the above cause, on the following grounds, separately and severally:
>
> • • •
>
> "3. For that this proceeding is quasi-criminal and highly judicial and to permit the use of a deposition without the consent of the defendant violates his right of confrontation guaranteed by Amendment VI, Constitution of the United States, as the same is made applicable to the State of Alabama by the operation of Amendment XIV, Constitution of the United States."

Another motion to suppress these two depositions was filed on the 30th of January, 1967, and contained the following reservation of federal constitutional rights:

> "3. For that this proceeding, which is scheduled at the present time to be held on Thursday, February 2, 1967, is quasi-criminal, highly judicial, and a severe penalty is possible, and to permit the use of depositions without the consent of the defendant to enable the prosecuting

Grievance Committee to prove its charges violates his right of confrontation guaranteed by Article I, Section 6, Constitution of Alabama, 1901, and Amendment VI, Constitution of the United States, as the same is made applicable to the State of Alabama by the operation of Amendment XIV, Constitution of the United States." (R. p. 479)

This later motion also sought to suppress, on the same federal constitutional grounds, the depositions of each and every witness appearing at any time before the commissioner, Timothy M. Conway, Jr.

J. ROBERT HUIE on the 30th of January, 1967, further filed a Motion for Each Individual Commissioner to Recuse Himself (R. pp. 481-482). The gravamen of this motion in opposition to action by the Board of Commissioners of the Alabama State Bar, succinctly stated, was that each and every member of the Board of Commissioners had been furnished with a complete record of the testimony and evidence adduced by deposition, prior to any ruling on objections, and thereby effectively denying to J. ROBERT HUIE the benefit of a fair and impartial tribunal and due process of law.

The record reveals that Rule 25, Section A, was amended on the 20th of July, 1961, to its present reading. The guilt or innocence of J. ROBERT HUIE on a charge or charges of violations involving, among other, Rule 25, was determined by a meeting of the Board of Commissioners of the Alabama State Bar on the 3rd of March, 1967 (R. pp. 484, *et seq.)* Messrs. Walker, Blackburn, McQueen, Brantley, Hill, McCord, Carnes, and McDonnell were present on the 20th of July, 1961, and also on the 3rd of March, 1967 (R. p. 484). Exception on Fourteenth Amendment grounds to such a procedure was preserved by filing Objections to Certain Members of Board of Commissioners of the Alabama State Bar (R. p. 483).

The Board of Commissioners of the Alabama State Bar is the governing body of the integrated Alabama State Bar. Title 46, Section 21, *et seq.*, Code of Alabama, 1940, as amended. By Title 46, Section 25, Code of Alabama, 1940 (Appendix B, pp. 4 thru 6), the Board is given broad powers to formulate rules governing the conduct of attorneys in Alabama, such rules

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being subject to approval by the Supreme Court of Alabama; it investigates complaints made against attorneys; it appoints a committee (Grievance Committee) to take evidence against the charged attorney, which evidence is transmitted to the Board; the Board then sits as a judge and acts as a jury in the disciplinary matter; and the case is prosecuted by the aforesaid Grievance Committee and the general counsel of the Alabama State Bar, who is appointed by the Board of Commissioners (See, *e.g.*, R. pp. 484, *et seq.)*

J. ROBERT HUIE consistently interposed objections to the procedures utilized by the Board of Commissioners, as is illustrated in the deposition taken before Timothy M. Conway, as commissioner to take testimony, on the 24th of October, 1966 (R. pp. 174, *et seq.)*, *viz:*

> "MR. BLANTON: I'm going to make an objection at this time, that although it is stated that the Board of Commissioners would consider only relevant testimony, nethertheless to admit into evidence any testimony which the respondent considers illegal would, of necessity, reflect in the opinions of the Board of Commissioners in violation of the respondent's rights under Article I, Section 6, Constitution of Alabama of 1901, and the due process and equal protection clauses of Amendment 14 of the Constitution of the United States. In other words, what I'm saying is, to make it clear, that to put everything into the record, even though the Board of Bar Commissioners say that they will not consider it, nethertheless that they, of necessity, would consider it in violation of the rights of the respondent." (R. p. 189)

The Board of Commissioners on the 3rd of March, 1967, found J. ROBERT HUIE guilty of all charges-ONE through TWELVE (R. pp. 486 thru 492), and the punishment assessed was disbarment as to each charge separately and severally (R. p. 492). It must be here noted, especially, that the Supreme Court of Alabama affirmed the finding of guilty only as to Charges SEVEN, EIGHT, and NINE– the Anderson divorce matter and then approved the punishment of disbarment as to this one divorce (R. p. 672).

The first procedural step taken in the Supreme Court of

Alabama after the judgment of disbarment by the Board of Commissioners was a Petition for Stay filed on the 3rd of March, 1967 (R. p. 640). Then, a Petition for Writ of Certiorari to Board of Commissioners of Alabama State Bar was filed on the 7th of March, 1967 (R. pp. 643 thru 646). The Petition for Stay was denied, upon condition, on the 13th day of March, 1967 (R. p. 647). A Petition for Reconsideration was filed on the 14th of March, 1967 (R. pp. 641-642).

One of the contentions advanced in this latter petition was:

> "2. The procedure in disbarment cases in Alabama is so vague, uncertain and indefinite as to deny to your petitioner that due process guaranteed by the state and federal constitutions, and further violates the equal protection clause of Amendment XIV, U.S. Constitution, in that the order of March 13, 1967, affirmatively shows this Court has heretofore in these matters granted stays without condition."

This petition for reconsideration was stricken on the 15th of March, 1967, with two justices dissenting (R. p. 641).

The petition for certiorari was granted on the 27th of March, 1967, returnable within 30 days (R. p. 643). This petition specifically cited as errors of the Board of Commissioners the following:

> "1. The legal evidence adduced is insufficient to support the judgment of disbarment.
>
> "2. The Board of Commissioners erred in overruling OBJECTION TO JURISDICTION OF BOARD OF COMMISSIONERS OF ALABAMA STATE BAR.
>
> "3. The Board of Commissioners erred in overruling OBJECTIONS TO CERTAIN MEMBERS OF BOARD OF COMMISSIONERS OF ALABAMA STATE BAR.
>
> "4. The Board of Commissioners erred in overruling MOTION FOR EACH INDIVIDUAL COMMISSIONER TO RECUSE HIMSELF IN THIS PROCEEDING.

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"5. The Board of Commissioners erred in overruling MOTION TO SUPPRESS DEPOSITIONS, dated September 15, 1966.

"6. The Board of Commissioners erred in overruling MOTION TO SUPPRESS DEPOSITIONS, dated January 27, 1967.

"7. The Board of Commissioners erred in overruling OBJECTION TO TIMOTHY M. CONWAY, JR., AS COMMISSIONER TO TAKE TESTIMONY.

"8. The Board of Commissioners erred in overruling MOTION TO DISMISS COMPLAINT, AS AMENDED, which said motion contains 52 grounds.

"9. The Board of Commissioners erred in entering judgment of disbarment.

"10. The Board of Commissioners erred in entering judgment of disbarment in that argument of Grievance Committee was prejudicial." (R. pp. 654-655)

This cause was argued orally before the Supreme Court of Alabama, *en banc*, on the 31st of October, 1967 , and submitted (R.p.cover). Thereafter, on the 8th of January, 1970, the decision affirming the judgment of disbarment as to Charges SEVEN, EIGHT, and NINE was delivered (See Appendix A, pp. 1 thru 11). Judgment was entered on the same day (See Appendix A, p. 12).

A timely petition for rehearing was filed on the 20th of January, 1970, and denied, without opinion, on the 5th of February, 1970 (See Appendix A, pp. 13).

In this petition for rehearing the specific ground invited to the attention of the Supreme Court of Alabama was that the judgment of the 8th of January, 1970:

"***endorsed and affirmed a procedure or procedures which considered in the totality of such procedure or

procedures violate the due process clause of the Fourteenth Amendment, United States Constitution, and the entry of said judgment, accordingly, was as to this petitioner a denial of that due process guaranteed by the Fourteenth Amendment, United States Constitution." (R. p. 674).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Mr. Justice Tom Clark, formerly an active member of this Court, has been most outspoken recently in pronouncing his views concerning a seeming lack of vigor in Bar Associations in keeping their houses in order by tolerating attorney miscreants to remain at the Bar to further perpetrate their misdeeds, primarily in handling monies of clients, upon an unsuspecting public.

There can be no legitimate quarrel with his position, and none should be inferred from the present petition. Furthermore, no absconding with client's money is involved.

What is of concern is that method employed by Bar Associations, specifically here the Alabama State Bar, in the prosecution of alleged violations of statutes or rules of ethical conduct.

The dangers of combining in one body of men each and every facet of definition, administration, investigation, prosecution, and judgment were recognized by President Washington in his Farewell Address:

> "The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism."

This concentration of power in the Alabama State Bar represents a substitution of the shifting frontiers of personal command for the definite boundaries of general, impersonal law, and, as such, was the underlying basis for objection to the proceedings in Alabama as is clearly demonstrated by the opening paragraph of oral argument to the Supreme Court of Alabama on the 31st of October, 1967:

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"This Court today commences its formal consideration of a proceeding predicated on a Rule formulated by the Board of Commissioners of the Alabama State Bar, a private incorporated association, Ex parte *Griffith*, 278 Ala, at p. 348; prosecuted by the Grievance Committee of that Board or Association; heard by a commissioner appointed by that Board or Association; wherein rulings on law and evidence were entered by that Board; and wherein as final a judgment as possible, disbarment, was visited by that self-same Board of Commissioners upon the defendant, J. Robert Huie!

"Interwined with each and every argument and proposition to be advanced, there is urged there be an active recognition that constitutionally a lawyer is a first class citizen, and that revoking his right to practice law, involving, as it assuredly does, a penalty more severe than a criminal sanction, places the ultimate burden upon this Court of determining whether this proceeding measured up to standards consistent with that innate fairness inherent in the words of both the state and federal constitutions-"Due Process".

A brief consideration of the nature of disbarment proceedings may serve as a useful prologue to the discussion of the broad question presented. From an historical viewpoint, disbarment proceedings stem, probably, from the time of Henry VIII, Henry VIII, 4 Henry 4, C 18. Courts are not dependent upon any legislative action to exercise their right to disbar or discipline an attorney. ***State ex rel McCormick v. Winton***, 11 Ore. 456, expresses it thusly:

"This is an inherent power residing in the court without the aid of statutory enactment. The exercise of the power may be, as it often is, regulated by statute, but the statute does not create it. Its existence is necessary and incidental to the court for its own protection, to secure the proper administration of justice, to maintain the prestige of the profession for integrity, to conserve the common public good, and to protect clients from mal-practice attendant with fraud and corruption."

A careful investigation and close study of disbarment procedures in most of the jurisdictions of the United States reveals that in all, *excluding Alabama*, a supreme court rule or statute affirms in the courts the disbarment function. *E.g.*, Arizona, Arizona Code Annotated, 1939, Sec. 32-201, *et seq.*, and see In re *Greer*, 52 Ariz. 385, 81 P2d 96; Arkansas, Arkansas Code Annotated, Sec. 25-401, *et seq.;* Connecticut, Title 5, Sec. 51-90, Code of Connecticut; Delaware, Rule 32, Supreme Court of Delaware; District of Columbia, Title 11, Sec. 11-2101, *et seq.*, District of Columbia Code; Florida, Integration Rule of the Florida Bar, Article XI, Rules of Discipline, as amended December 13, 1961, and see The *Florida Bar v. Rogers*, 192 So2d 757 (Fla. 1966); Indiana, Rule 3-21, Rules of the Supreme and Appellate Courts, Burns' Indiana Statutes Annotated, Vol. 2, Part I (1966 Supp.), and In re *Hosea*, 201 NE2d 560 (Ind. 1960); Mississippi, Sec. 8711, *et seq.*, Mississippi Code, 1942, recompiled, and see In re *Petition for Disbarment of Lee v. Prisock*, 141 So2d 715 (Miss. 1962); Nebraska, Sec. 7-114, *et seq.*, Revised Statutes of Nebraska, 1943, and see *Nicklaus v. Simmons*, 196 FSupp 691; Rhode Island, Rule 9, Rules of the Supreme Court of Rhode Island, and see In re *Aram K. Berberian*, 213 A 411 (Rhode Island); etc.

Some courts use commissioners, masters or referees to take testimony, but these commissioners, masters or referees are officers *of the court* which is hearing the complaint. *E.g.*, California, Florida, Hawaii, Louisiana, Missouri, etc. Such is not the situation in Alabama.

Florida has a most sophisticated arrangement wherein the Supreme Court of Florida utilizes organizations of the integrated bar in disciplinary proceedings, but in the final analysis, whether defendant appeals or not, the Supreme Court of Florida issues the final order of disbarment. See *The Florida Bar v. Rogers*, 192 So2d 757 (Fla. 1966), and Rule 11.11, Integration Rule of the Florida Bar.

In Alabama, if the defendant does not ask for a review, or if the Supreme Court of Alabama on its own initiative does not call up the record for review, the matter is concluded. Whether actually in practice the Supreme Court of Alabama does call up for review all cases, does not alter the situation, and it is clear

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that a disciplinary proceeding may be concluded at the level of the Board of Commissioners. See Title 46, Section 25, Code of Alabama, 1940, which is as follows, in pertinent part:

> "The supreme court may, and on petition of the aggrieved party must, in any case of suspension or disbarment from practice, review the action of the board, and may, on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment."

Thus, Alabama appears to stand alone among the jurisdictions in the United States by entrusting to a body of men *other than a court* the power of disbarment. In this context then, the question which is being presented to this Court takes on a vitality which may not be present when a court is that independent body which sits in ultimate judgment. In the present situation the awesome power of disbarment actually resided in the Board of Commissioners of the Alabama State Bar.

The point will undoubtedly be raised that J. ROBERT HUIE in reality had an independent adjudication by the Supreme Court of Alabama as to Charges Seven, Eight, and Nine, and, therefore, is in no position to now register these objections.

There is a simple answer, and, it is believed, a most cogent one. The approval of such a position would forever close the doors of this Court to the assertion of federal constitutional rights in Bar disciplinary proceedings in Alabama, since to exhaust the remedies afforded by Alabama an attorney must petition the Supreme Court of Alabama for a review of the determination of the Board of Commissioners of the Alabama State Bar.

I.

The question presented for review is an encompassing one, and invites the consideration of the Court to many varied aspects of disciplinary procedures involving attorneys in Alabama. It is assumed, *arguendo*, that not one of these facets considered in and of itself would be sufficient to raise

effectively any Fourteenth Amendment question.

The nature of the right to practice law is ably stated by the Supreme Court of Pennsylvania in In re *Schlesinger*, 404 Pa 584, 172 A2d 835(1963):

> "The right to practice law is constitutionally protected as a property right and no attorney can lawfully be deprived of such right except by due process of law and upon competent and relevant proofs sufficiently credible to support a judgment of disbarment." (p. 840)
>
> Further, the Pennsylvania court said:
>
> "***A disbarment proceeding is every bit as serious as a criminal trial and often more so; the penalty of disbarment is certainly harder than a fine or short imprisonment.***" (p. 848)

The exclusion of attorneys from the right to practice law is the exercise of a judicial power. See In re *Garland*, 71 US 333 (1866).

And it seems axiomatic that anyone who sits in judgment cannot act as a prosecutor since this is inherently unfair and incompatible with the concept of due process of law. See *Ruiz v. Delgado*, 359 F2d 718 (CA 1, 1966).

This Court in In re *Murchison*, 349 US 133 (1955) recognized the fundamental precept here involved when it *held* that where the same judge who presided at a contempt hearing had also served as a one-man grand jury out of which the contempt charges arose there was a denial of that due process guaranteed by the Fourteenth Amendment. Mr. Justice Black, speaking for the Court, wrote:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very person accused as a result of his investigations.***" (p.137)

In re *Schlesinger*, 404 Pa 584, 172 A2d 835(1963), demonstrates the applicability of this salutary principle of law to a disciplinary proceeding against an attorney. It was held that an attorney was denied due process where the functions of

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prosecutor, judge and jury were combined in a committee of the Court of Common Pleas, which committee lodged and prosecuted, and, through its subcommittee, adjudicated the charges whereon the court, without any hearing of witnesses, entered the disbarment order. The ultimate basis for the conclusion of the reviewing court was that, under these circumstances, there could be no full, fair and impartial hearing of the charges against the accused attorney. The situation there is strikingly parallel to the situation in Alabama where the Alabama State Bar exercises unfettered control of all the minutiae of disciplinary proceedings.

A.

An alleged violation of Rule 25, Section A, as last amended, Appendix B, *infra*, pp. 6-7, must be considered the ultimate justification for the prosecution of this disbarment proceeding.

Rule 25, Section A, as last amended, was the product of a spirited meeting of the Board of Commissioners in July, 1961, wherein, from information available, there was a heated contest between members from the legal establishment representing banks, railroads, and other vested money interests and the members representing what may be termed the populist legal faction of attorneys without a guaranteed income through retainers. The battle had developed over the proviso added by the 1945 Alabama Legislature to Title 34, Section 29, Code of Alabama, 1940, which permitted the granting of a divorce where the defendant was a non-resident if the court had jurisdiction of both parties to the cause. See Appendix B, p. 3 , *infra*.

It appeared to be the consensus that this proviso had allowed Alabama to develop through its courts "a divorce mill".

The validity of the statute prior to the proviso appears doubtful. In March, 1970, the Family Court, Third Circuit, State of Hawaii, ***Whitehead v. Whitehead***, Case D. No. 5505, Judge Nelson Doi presiding, entered its decision declaring unconstitutional a provision of Hawaiian law which prescribed a residence for a continuous period of one year prior to the filing of the divorce complaint. Section 580-1, Hawaii Revised

Statutes. The defendant was a non-resident, and the plaintiff established that she had come to Hilo, Hawaii, with the intent to remain an indefinite time.

Pertinent excerpts from this decision are helpful:

"The question in this case is whether under the United States Constitution the State can deny access to the courts of a resident of less than one year, who believes that she has adequate grounds for divorce, until she acquires a total residence period of one year by waiting, and further residing continuously in the State of Hawaii, when the resident who has resided for over one year is not so denied, and may go to the courts for relief, without further waiting, upon belief that there is sufficient grounds for divorce. The question comes about from the application of the second sentence of Section 580-1, Hawaii Revised Statutes, which reads as follows:

> "No absolute divorce from the bond of matrimony shall be granted for any cause unless either party to the marriage has been domiciled or has been physically present in the state for a continuous period of at least one year next preceding the application therefor."

"Judicial propriety requires that the Court should not be overly concerned with whether Hawaii becomes a 'Divorce Haven' – that should be met with policy and program, and that is for the legislature.

"The Court finds and concludes that the Plaintiff is domiciled in the State of Hawaii and has resided in the Third Circuit for at least three months. Domicile can be established by the concurrence of act and intent, physical presence and intent to remain, and an intent to abandon the old domicile. 'No definite period of time is necessary...one day is sufficient.' *Powell v. Powell*, 40 Haw. 625.

"Access to the Courts is protected by the equal protection clause of the Fourteenth Amendment of the Constitution: See: Chicago v. Northwestern Railway Company v. Nye Schneider Fowler Company, 260 U.S. 35, 67 L.Ed. 115, 43 S.Ct.55; Ex parte Young, 209 U.S.

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123, 53 L.Ed. 714, 724, 28 S.Ct. 441, 13 LRA NS 932;***

"Under the traditional standard, equal protection is denied if the classification is without any reasonable basis--when the classification has no reasonable relation to a legitimate governmental objective.***

"There is no dispute that the effect of the waiting period requirement (Sec. 580-1, H.R.S.) has created two classes of persons--both of them have grounds and do want to apply to the courts for a divorce. One is composed of residents who have resided a year or more, and the other of residents who have resided less than a year, in the jurisdiction.

"What standard do we apply? Even applying the traditional standard, and not the stricter *Shapiro* standard *(Shapiro v. Thompson,* 394 U.S. 618), the waiting period requirement clearly violates the equal protection clause."

J. ROBERT HUIE, then, as a divorce practitioner, submits the only logical, mandatory requirement flowing from the Alabama divorce statutes is to present evidence to the trial court of the domicile of at least one of the parties to the divorce action. Nonetheless, Rule 25, Section A, as amended, casts upon him additional onerous tasks in and about a determination of domicile. This was clearly pointed out in the brief on submission to the Supreme Court of Alabama:

"Manifestly, divorce attorneys have been singled out for special treatment in the matter of knowledge or reasonable cause to know the domicile of the parties involved. For instance, in United States District Courts, jurisdiction may be predicated on diversity of citizenship or domicile. Is not the burden just as great there for an attorney to accurately plead the non-residence of plaintiff or defendant? Yet, if the opposition does not object and the matter is never brought to the attention of the trial court, the case could end just as in a divorce case with a subsisting valid judgment until set aside. The divorce attorney has been separated most assuredly from his fellows. The classification of divorce attorneys in this

regard is unjust, unreasonable, unnecessary and without any substantial basis.

"In essence, the fundamental question is the duty owed by any attorney - bank lawyer, insurance lawyer, railroad lawyer, damage suit lawyer, or what have you - to investigate the allegations he may plead in a complaint or answer. Upon what may any lawyer rely in the presentation of his case to a court? Does a damage suit lawyer who alleges negligence and who then cannot prove negligence on trial perpetrate a fraud on the court because he has relied on his legal opinion defendant was negligent? In the overwhelming majority of cases he has accepted the word of his client as to what occurred.

"This divorce attorney in this case has accepted the word of his client, mostly under oath, he or she was a resident of Alabama. Are divorce attorneys to be a breed apart from other attorneys and their actions subjected to a higher standard than demanded of others? An unqualified "YES" must be the only answer, if Rule 25, Section A, as amended, is allowed to stand as not being in violation of the equal protection clause of Amendment XIV, Constitution of the United States."

J. ROBERT HUIE would state further in this aspect that Rule 25, Section A, as last amended, is causing conduct of an attorney in procuring divorces, *unless he be able to probe the mental processes of his client and ascertain his true intention as to future permanent residence in Alabama,* to be denominated unethical and subjecting himself to disbarment, although the trial court has been satisfied client's statement concerning domicile was sufficient. The error of the trial judge in accepting this evidence as sufficient to establish domicile, if error it be, is being visited upon the attorney. No one must lose sight of the fact that the determination of domicile is a judicial function; all an attorney can do is to present facts to the court. Petitioner submits such a procedure clearly violates his rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution.

B.

It has been noted that several members of the Board of Commissioners that formulated Rule 25, Section A, as last amended, sat to determine the facts allegedly tending to

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demonstrate the guilt of J. ROBERT HUIE. *Arguendo*, the Board must be considered the petit jury. Petitioner was a defendant in a highly judicial, quasi-criminal, trial. See Ex parte, *Dozier*, 262 Ala 197, 77 So2d 903; Ex parte *Messer*, 228 Ala 16, 152 So 244, quoted with approval in Ex parte *Huie*, 278 Ala 330, 178 So2d 156.

The Supreme Court of Alabama has ruled that in a criminal trial, and a disbarment proceeding must be considered the equivalent of a criminal trial, great care should be exercised to preserve to an accused his constitutional rights to a fair trial by an impartial jury, and that in such cases any doubt as to the competence of a juror must be resolved in favor of a defendant. See *Wilson v. Alabama*, 243 Ala 1, 8 So2d 422. It has been held further in Alabama that a person is disqualified to sit as a juror where it is his duty to enforce the laws of a city, the violation of such a law being the subject matter of the prosecution. *Shapiro v. City of Birmingham*, 30 Ala App 1, 10 So2d 38.

The conclusion is imperative that petitioner was denied that fair and impartial tribunal for the determination of his guilt or innocence guaranteed by the Sixth Amendment, United States Constitution, as the same is made applicable to Alabama by operation of the Fourteenth Amendment, United States Consitution.

C.

The Board of Commissioners of the Alabama State Bar employed the Honorable William H. Morrow, Jr., as general counsel, and, as the record shows, he prosecuted this case against petitioner. This was in direct violation of Title 46, Section 25, Code of Alabama, 1940, as amended, which provides: "***The state solicitor (now district attorney) of the circuit in which such accused attorney resides shall prosecute any such charge or case, interrogate the witnesses, introduce the evidence in support of such charges, and when requested by any member of the board, argue the cause before the board.***"

The Board of Commissioners saw fit in its misguided zeal to retain the prosecution in its own hands and under its own direction. Mr. Morrow cannot be faulted in this regard; the

Board of Commissioners must be deemed to be the culprit. This is but another piece in the mosaic of unfettered control in the Board of these disbarment proceedings.

Petitioner hesitates to use the venacular in a petition in this Court, but, at this point, things began to reek of a higher odor than those in Denmark of Shakespeare's "Hamlet"! They "stink".

Petitioner insists that this, once again, shows a violation of the doctrine of In re *Schlesinger, supra*, which doctrine, it is urged, should be considered and accepted by this Court on federal constitutional grounds.

D.

Every shred of evidence against petitioner was brought before the Board of Commissioners on the 3rd of March, 1967, by means of deposition, or other proceedings held outside the presence of the several commissioners. The Supreme Court of Alabama upheld this non-confrontation, which was denounced in In re *Schlesinger, supra*.

It is evident that the characterization of disbarment proceedings as quasi-criminal or *sui generis* is but an attempt by the Alabama court to circumvent the applicability of federal constitutitional standards. Compare *Bloom v. Illinois*, 391 U.S. 194.

Thus, it is the position of petitioner that he was not confronted with the witnesses against him in the tribunal which adjudicated his guilt. See *Pointer v. Texas*, 380 US 400.

To cast upon defendant, as in this case, the burden of traveling from Alabama to New Jersey, and employing counsel to represent him, to enjoy his federal constitutional right of Sixth Amendment confrontation is patently a denial of the right by indirection.

Casting aside the labeling of disbarment proceedings as being quasi-criminal, the crux of the matter is that disbarment is a severe punishment, as so denominated, and correctly, in In re *Schlesinger, supra*. Where the punishment is of great magnitude, then federal constitutional standards of right should be applied. Compare *Duncan v. Louisiana*, 391 US 145. See *Willmer v. Committee on Character and Fitness*, 373 US 96 (1963).

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E.

Petitioner challenged the validity of Rule 36, Section A, for vagueness and argued this in brief to the Supreme Court of Alabama. As was stated by this Court in *Connally v. General Construction Co.*, 269 US 385, 391, it is a rule "which forbids*** the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Contrast *Zwickler v. Koota*, 389 US 241.

"Conduct unbecoming an attorney" does not have any definite standards. Its interpretation is solely subjective, and, when placed in the hands of *a non-court connected body* it must, and should, be denounced!

Clearly, there is not compliance with federal standards of definiteness.

F.

J. ROBERT HUIE interposed the objection that the disbarment proceedings were void because a trial by jury was not provided for in the statutes concerning disciplinary proceedings.

It is worth noting that dentists and doctors, among the professions, have the right to trial by jury in Alabama. See Title 46, Section 94, Code of Alabama, 1940, and Title 46, Section 284, Code of Alabama, 1940. This is on its face an invidious discrimination.

The Supreme Court of Alabama rejected the right to trial by jury in *In the Matter of John Ike Griffith*, 219 So2d 357 (Ala 1969), by relying on the theory that courts have an inherent power of disbarment. The Supreme Court of Alabama missed the point, because, as has been spelled out, *a court did NOT enter an order of disbarment.* The Board of Commissioners of the Alabama State Bar is NOT a court.

G.

Petitioner is concerned further with the standard of proof adopted by the Supreme Court of Alabama in this basically criminal proceeding. The court stated:

"From the evidence summarized above, we are reasonably satisfied that George E. Anderson was a resident of New Jersey and was not a resident of Alabama in December, 1964, or January, 1965,***" (Emphasis supplied) (Appendix A, *infra*, p. //).

The serious charges of this case demand a higher standard of proof, *i.e.*, there should be invoked the criminal standard of satisfaction beyond a reasonable doubt. And, it is pointed out, the Supreme Court of Alabama did not apply the civil standard of proof with the preponderance of the evidence. See Frankfurter and Black, dissenting, *Leland v. Oregon*, 343 US 790 (1952).

H

While no further point is here made on the merits, the case of *Sullivan v. Alabama State Bar, et al.*, 394 US 812, shows the innate unfairness of the composition of the Board of Commissioners of the Alabama State Bar, *a non-judicial body*.

Considered with the other aspects of this case, and the point was raised below by petitioner, the ill-apportionment of the Board works a discrimination against him. This factor must be here considered.

I.

The rules of the Board of Commissioners of the Alabama State Bar concerning evidence grant *to a non-judicial body* the right to determine, in its opinion, whether or not evidence is relevant, material or competent. See Appendix B, *infra*, p. 7

How this comports with due process escapes petitioner! His many objections were summarily overruled; and the Board of Commissioners did have before it all the evidence and it must be granted that this was an influence on the Board, notwithstanding any disavowals such evidence was not being considered.

J.

This Court should consider that, over objection, a member of the Alabama State Bar was the commissioner in this cause to take evidence in the *Anderson* divorce.

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This illustrates once again the overwhelming position of the Alabama State Bar in acting as prosecutor, investigator, judge and jury. There is absolutely nothing involved in this disbarment proceeding which was not under the complete control of the Alabama State Bar, *a non-judicial body.*

K.

Finally, the affirmance of disbarment for ONE divorce case is so obviously an ignoring of federal due process as to require no lengthly discussion.

It is a well-known fact that the Alabama State Bar in the time period of the inception of this proceeding did not bring charges under Rule 25, Section A, as Amended, against any attorney who had obtained less than what the Bar considered a maximum figure, *i.e.*, 50. Yet, here, an attorney is being disbarred for ONE divorce, and it is doubtful whether or not the lower court in Alabama acted correctly or judicially.

The morality of the situation not being in question, the legality of it is suspect.

CONCLUSION

Leonard Levy in his 1968 book, *Origins of the Fifth Amendment,* delineates in minute detail the machinations of the High Commission in England during the later part of the Sixteenth Century.

It is quite striking how many details the procedures utilized by the High Commission in ferreting out and convicting heretics are reflected in the procedures used in this case by the Board of Commissioners of the Alabama State Bar, *a non-judicial body,* to assure the disbarment of an Alabama attorney.

Because of the totality of the procedures, petitioner submits his petition for certiorari should be granted in order that the case be briefed fully on the merits of the question presented.

This question is of utmost importance to lawyers in

Alabama, and, also, to lawyers in each of the jurisdictions in the United States.

Reflecting the views of the Honorable Tom Clark, each member of the various bars should be alert to maintenance of a completely ethical bar association. However, without the guidance of this Court, particularly as to procedures, the pursuance of miscreants at the bar shall only foment extensive and delaying litigation.

Respectfully submitted,

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Counsel for Petitioner

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1969-70

In the Matter of J. Robert Huie
(J. Robert Huie

3 Div. 276

v.

Board of Commissioners of the
Alabama State Bar

Appeal from Board of Commissioners
of the Alabama State Bar)

PER CURIAM.

We review a proceeding before the Board of Commissioners of the Alabama State Bar, herein referred to as the Board, wherein J. Robert Huie was found guilty of certain charges and disbarred from the practice of law. He is sometimes herein referred to as petitioner.

In substance, the charges are to effect that Huie, either in person or in association with other attorneys, did represent certain parties in divorce cases in Alabama; that in said cases neither party to the suit was a resident of Alabama; that Huie had knowledge or reasonable cause to believe that neither party to the suit was a bona fide resident of Alabama at the time of filing the bill of complaint therein; and that, with such knowledge or reasonable cause for belief that neither party was a resident of Alabama, Huie, either in person or in association with another attorney, did submit to certain courts of this state certain cases wherein the pleadings and testimony falsely represented that complainant was a resident of Alabama.

The charges fall into four groups. Charges 1 through 4 relate to 76 cases in Geneva County; Charges 5 and 6 to 13 cases in Marion County; Charges 7, 8, and 9 to a case in Jefferson County; and Charges 10, 11, and 12 to a case in Winston County.

Certain charges in each group allege violation of amended Rule 25, of Section A, of Rules Governing The Conduct of Attorneys, approved October 23, 1961. This rule will be referred to as Rule 25. It is set out in 272 Ala. at pages XXI and XXII and is copied at length in: *In re Sullivan,* 283 Ala. 514, 518, 519, 219 So. 2d 346; *In re Griffith,* 283 Ala. 527, 531, 219 So. 2d 357; and *Smith v. Board of Commissioners of Alabama State Bar,* *Ala.* , 225 So. 2d 829, 830, 831.

Certain charges in each group allege violation of Rule 36 of Section A of said rules which recites:

> "36. No person licensed to practice law in the courts of the State of Alabama shall be guilty of any conduct unbecoming an attorney at law." (239 Ala. XXV)

Charges 8 and 11 allege violations of Rule 16 of Section A of said rules which recites:

> "No person heretofore or hereafter admitted to practice law in Alabama, shall
>
> ". . . . . .
>
> "16. Introduce or offer to introduce any testimony which he knows to be false or forged." (239 Ala. XXIV)

Counsel for Huie ably and vigorously represented him and filed numerous motions and objections which were overruled by the Board. The issues formally raised by these pleadings and the action of the Board in overruling Huie's motions and objections are the subject of the assignments of error first argued by counsel for Huie and will be first considered in this opinion.

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Assignment II.

Petitioner filed a pleading entitled Objection to Jurisdiction of Board of Commissioners of the Alabama State Bar, and the Board overruled the objection. Petitioner assigns this action of the Board as error and argues that his objection should have been sustained on Grounds A, B, and C.

In Grounds A and B, petitioner asserts that the Board of Commissioners is unconstitutionally established and without jurisdiction to try petitioner and was also without jurisdiction to promulgate Rule 25; all for the reason that the Board is composed of members who are elected, one member from each judicial circuit in the state, and because the number of lawyers and the number of people in some circuits are much greater than the numbers of lawyers and people in other circuits.

Ground C is that the Board is unconstitutionally established in violation of Sections 42 and 43 of the Constitution of 1901 which require separation of the powers of government among three separate magistracies.

These are the same issues which were raised by Assignment II in *In re Sullivan*, supra, 283 Ala. at 521, 522, and there decided adversely to petitioner's contentions. For the reasons stated in *Sullivan*, Assignment II in the instant case is not sustained.

Assignment III.

In this assignment, petitioner asserts that the Board erred in overruling his objection to certain members of the Board sitting in the instant case. Petitioner says those certain members objected to were not qualified to sit in the instant case because they were members of the Board when Rule 25, as amended, was adopted by the Board in 1961.

This is the same assignment which was presented as Assignment III in *Sullivan* and, for the reasons there stated, is not sustained.

Assignments V and VI.

In these assignments, petitioner asserts that the Board erred in overruling his motions to suppress certain depositions which were taken and introduced into evidence in the instant case.

In Ground 1 of the motions to suppress, petitioner asserts that the depositions are due to be suppressed because, if the depositions were taken under authority of Title 7, § 457, Code 1940, the depositions were not admissible for that no affidavit was made as required by Title 7, § 458.

In Ground 2 of the motions, petitioner asserts that the depositions are not admissible under authority of Act No. 375, Acts of 1955, Vol. II, page 901; which appears in 1958 Recompiled Code, Title 7, § 474(1), et seq; because Act. No. 375 does not apply to disbarment proceedings.

These same contentions were made and decided adversely to petitioner in *Sullivan* under Assignment V, and, for the reasons there stated, Assignments V and VI in the instant case are not sustained.

Assignment VII.

Petitioner asserts that the Board erred in overruling his objection to Timothy M. Conway's appointment as commissioner to take depositions on the ground that Conway was a licensed member of the Alabama State Bar.

The action of the Board was not error. See Assignment VII in *Sullivan*.

Assignment X.

Petitioner says that, by improper argument made before the Board by Mr. Mims as counsel for the Grievance Committee, petitioner ". . . . has been prejudiced to the point where this Court cannot consider in any respect the judgment of disbarment entered by the Board of Commissioners . . . . in its review of this record."

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This court has read in consultation the argument made by Mr. Mims, as set out on pages 540 through 543 of the record, and are of opinion that the argument there appearing does not require reversal of the judgment of disbarment.

Assignment VIII.

Petitioner assigns as error that the Board erred in overruling his motion to dismiss the complaint as amended, which motion contains 52 grounds.

(1) In Grounds 8 and 35 of the motion to dismiss the complaint, petitioner asserts that Rule 25 is in conflict with interpreted statutory law, to wit: §§ 27 and 29, Title 34, Code 1940, as amended; and, therefore, that Rule 25 is void and violates the constitutional guaranty of due process. In *Sullivan*, under Assignment IX, this contention was held to be without merit and we follow that holding here.

(2) In Grounds 41 through 46, petitioner asserts that Rule 25 violates his rights to equal protection and due process under the state and federal constitutions. In considering Assignment IX, in *Sullivan*, this court held this contention to be without merit, and we follow that holding here.

(3) In Grounds 47 through 49, petitioner asserts that the Grievance Committee was illegally appointed by the President of the State Bar. This contention is without merit under authority of *Sullivan*, in which see Assignment IX.

(4) In Grounds 50 through 52, petitioner asserts that the officers of the State Bar are without power to act in this proceeding inasmuch as they were illegally and unconstitutionallyelected. This contention is without merit under authority of *Sullivan*, in which see discussion in Section 4 under Assignment IX, paragraph [16].

(5) In Grounds 10, 11, 37, and 38, petitioner again contends that composition of the Board is illegal because of disparity in the number of lawyers in judicial circuits. This contention has already been held to be without merit in consideration of Assignment II, supra.

(6) In argument in support of Ground 5 of the motion to quash the complaint, petitioner says, with reference to charges laid under Rule 36:

> "In fact, it appeared to be the position of the Grievance Committee that this charge pertained to refusal to testify on the part of the defendant. . . ."

The record shows that the petitioner did refuse to testify when he was called as a witness by the Grievance Committee, but the charges laid under Rule 36 do not specify his refusal to testify as a violation of Rule 36 or any other rule. We do not understand that his refusal to testify is in anywise made the basis of any complaint against petitioner in this record. Ground 5 is not well taken.

Assignment I.

This assignment does not arise out of any pleading filed on behalf of petitioner. Petitioner simply argues that the judgment of disbarment ought to be set aside because the legal evidence is not sufficient to support a finding that he is guilty of any charge made against him in the instant proceeding. We will consider whether the legal evidence is sufficient to support a finding that petitioner is guilty of the things he is charged with having done as set out in Charges 7, 8, and 9.

We review the evidence de novo without any presumption in favor of the findings of the Board because the testimony was taken by deposition and not ore tenus before the trier of fact. This rule of review has been stated by this court in numerous cases, and, in *Ex parte Acton*, 283 Ala. 121, 214 So. 2d 685, this court held that the rule applies to review of disbarment proceedings. See the authorities cited in P [1]in *Acton* and also: *Martin v. Culpepper*, 253 Ala. 412, 44 So. 2d 568; *Shubert v. Lacy*, 257 Ala. 629, 60 So. 2d 442; and *Kennedy v. State Department of Pensions and Security*, 277 Ala. 5, 166 So. 2d 736.

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Charge 7 recites:

"CHARGE SEVEN

"(Violation of Rule 25, Section A)

"On, to-wit, January 27, 1965, the said attorney did submit to the Circuit Court, Tenth Judicial Circuit of Alabama, a divorce case, namely, George E. Anderson vs. Loretta A. Anderson, in Equity, Case No. 137-515, wherein the Bill of Complaint and deposition of complainant represented to the Court that the complainant was a bona fide resident of the State of Alabama, when, in truth and in fact, the said attorney knew, or had reasonable cause to believe, that neither the complainant nor the respondent was a bona fide resident of the State of Alabama.

"The Grievance Committee charge that in doing the above described acts, the said attorney was guilty of violating or failing to comply with Rule 25 of Section A of the Rules Governing the Conduct of All Persons Admitted to the Practice of Law in the State of Alabama, the same having been heretofore attached to the pleadings in this cause."

In Charge 8, the Grievance Committee charges that petitioner violated Rule 16 which is quoted above. The facts alleged in Charge 8 are the same facts alleged in Charge 7 relating to the Anderson case.

A copy of the file, or the original, in Case No. 137-515 is in the record. The bill of complaint is signed by petitioner as solicitor for complainant. He alleges:

"1. Complainant is over the age of twenty-one years and is a bona fide resident citizen of Jefferson County, Alabama. That the respondent is likewise over the age of twenty-one years and she is a resident of this county and state."

In the same file, the deposition of complainant recites:

"My name is George E. Anderson. I am the above named Complainant in this divorce suit in which my wife is the Respondent. Her name is Loretta A. Anderson. I am thirty-four years old, and I am a bona fide resident citizen of the State of Alabama and Jefferson County. I have been such for the time required by law. I am now employed by the A. & P. Tea Company. My wife is thirty-three years old, and she is not residing in this County and State at this time."

In Charge 9, the Grievance Committee alleges the same facts as in Charge 7 and charges that the same constitute a violation of Rule 36, supra; i. e., that petitioner is guilty of conduct unbecoming an attorney.

It is clear and, we think, undisputed that petitioner did represent complainant in the Anderson case. The bill of complaint is marked as filed by the register on "JAN 27, 1965." A final decree granting a divorce is dated the same day.

Under date of February 17, 1965, the same judge who signed the divorce decree of January 27, 1965, signed a decree setting aside the decree of January 27, 1965.

The respondent, Loretta A. Anderson, testified before a commissioner in New Jersey. Counsel for petitioner were present at her examination and counsel for petitioner cross-examined her. She testified that her residence address is: 34 Spruce Street, Carteret, New Jersey; that she has resided there thirteen years; and that she has been a resident of New Jersey all her life. It appears to be clear and, it seems, undisputed that she is not and never has been a resident of Alabama.

She testified further that she and George E. Anderson are married; that they separated in 1961; that he lived in Sewaren for a while and then moved to Perth Amboy; that he filed suit for divorce in 1961, approximately, and the suit was thrown out of court; that on or about December 24, 1964, he came to the house where she lived; that she signed a paper; that the answer in the file in Case No. 137-515 is not the paper she signed but the signature on the answer is her signature; that the next day she went to the office of an attorney, Edward J.

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Dolan, in Carteret; that she called her husband on the telephone and talked to him; that after the telephone conversation with her husband on December 25, she saw him at a department store in Woodbridge, New Jersey, between December 25 and January 15; that after January 27, she got the final decree from Alabama; she took it to Dolan's office; a couple of days later her husband called her; that her husband is with the A & P Company in Rahway; that after the divorce decree was called off, he called practically every day for two weeks, and she had her phone number changed; that in December, 1964, and January and February, 1965, he was making weekly payments for child support and she got a check every week from the court in New Jersey.

Edward J. Dolan testified before the commissioner in New Jersey also. Dolan testified that Loretta A. Anderson came to his office around December 24, 1964; she told him she had signed a paper for the husband; that he placed a call to petitioner's office in Birmingham; that someone else answered; that Dolan asked to have petitioner return his call; that Dolan got a return call from a man who said he was petitioner; that Dolan told petitioner that both the Andersons were nonresidents of Alabama; that petitioner said the case would not proceed further; that Dolan wrote and sent to petitioner a letter dated December 24, 1964, which is in evidence and recites in part as follows:

"RE: George Andersen
vs: Loretta Andersen

"Dear Mr. Huie:

"This is to advise that this office represents Loretta Andersen of Carteret, New Jersey whose husband is represented by your office for the purposes of obtaining a divorce in the State of Alabama.

"George Andersen is a bona fide resident of the State of New Jersey. He attempted to obtain a divorce from his wife in this State and said divorce was denied, within the past 3 months by the Courts of the State of New Jersey.
"
"If her husband proceeds against her in the State of

Alabama, she intends to contest said divorce and also the jurisdiction of the Court to hear and to enter judgment of divorce, as neither she nor her husband are bona fide residents of Alabama."

Sometime later, Dolan received, he thinks, from Mrs. Anderson, a copy of the divorce decree of January 27, 1965. He wrote to the trial judge and others.

There is in evidence a copy of a letter from petitioner to Dolan dated February 10, 1965, which contains the following statements:

"Re: Mrs. Loretta Anderson

"Dear Mr. Dolan:

"I received today the copy of your letter to the Clerk of the Circuit Court concerning the above-styled case.

"I owe you an apology and will do whatever is reasonable to correct a mistake inadvertently made by this office. I had two Anderson files for some unknown reason, and your letter to me of December 24th, and the reply thereto, were misplaced in the wrong file. Consequently, in the rush of business, when Mr. Anderson appeared in my office with the signed Answer and Waiver, representing same to me to be his wife's signature, this office processed the case.

"Today I have discovered your letter of December 24th, and if Mrs. Anderson wishes to contest the divorce I will certainly do nothing to stand in the way of this contest. However, since my file indicates that the parties have been separated for a long period of time, could it be that Mrs. Anderson may wish to reconsider the matter, that this could be the best solution to her marital difficulties?

" . . . . . .

"If you wish to discuss this further with your client and let me know what action if any you may wish to take. I would appreciate it if you would correspond directly with me rather than the court."

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In December, 1964, Dolan called George E. Anderson at the A & P store in Rahway and talked with him.

From the evidence summarized above, we are reasonably satisfied that George E. Anderson was a resident of New Jersey and was not a resident of Alabama in December, 1964, or January, 1965, when Case No. 137-515 was filed by petitioner, and further that petitioner had knowledge that Anderson was not such a resident at that time. Petitioner's letter of February 10, 1965, to Dolan acknowledges that petitioner had received Dolan's letter of December 24, 1964, which plainly states that George Anderson is a resident of New Jersey. We are not persuaded that the statement with reference to two Anderson files contained in petitioner's letter of February 10, 1965, is sufficient to exonerate him.

The finding stated above is sufficient to support the judgment of guilt on Charges 7, 8, and 9, and the punishment of disbarment.

This record contains 546 pages. No useful purpose would be served by extending this opinion to include consideration of the evidence which was introduced in support of the other nine charges and we pretermit discussion of them. The evidence supporting Charges 7, 8, and 9 sustains the judgment of disbarment and we deem it proper to rest affirmance on those charges alone.

AFFIRMED.

All the justices concur except Lawson, J., not sitting.

THE SUPREME COURT OF ALABAMA

THURSDAY, JANUARY 8, 1970

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES SIMPSON, MERRILL, COLEMAN, HARWOOD, BLOODWORTH, MADDOX AND McCALL.
ASSOCIATE JUSTICE LAWSON, NOT SITTING.

3rd Div. 276

In the Matter of J. Robert Huie

(J. Robert Huie v. Board of Commissioners of the Alabama State Bar)

Come the parties by attorneys and the Petition for Review and the record and matters therein assigned for errors being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Board of Commissioners of the Alabama State Bar there is no error.

IT IS CONSIDERED, ORDERED AND ADJUDGED that the resolution, order and judgment of the Board of Commissioners of the Alabama State Bar finding J. Robert Huie guilty of Charges 7, 8 and 9 preferred against him be, and the same is hereby affirmed.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the resolution, order and judgment of the Board of Commissioners of the Alabama State Bar disbarring J. Robert Huie from the practice of law be, and the same is hereby, affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the costs incident to these proceedings be, and the same are hereby taxed against the petitioner, J. Robert Huie, for which costs let execution issue.

Per Curiam Opinion

All the Justices concur except Lawson, J., not sitting.

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SUPREME COURT OF ALABAMA

THURSDAY, FEBRUARY 5, 1970

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES LAWSON, SIMPSON, MERRILL, COLEMAN, HARWOOD, BLOODWORTH, MADDOX AND McCALL.

3rd Div. 276

IN THE MATTER OF:

J. ROBERT HUIE

PETITION FOR REVIEW

IT IS ORDERED that the application for rehearing filed on January 20, 1970 be and the same is hereby overruled.

APPENDIX B

B1

Constitution, Statutes and Rules Involved

I

Constitution of the United States, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II

Constitution of the United States, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trail, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

III

Constitution of the United States, Amendment XIV, Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV

Title 28, Section 1257(3), United States Code.

Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

V

Title 14, Section 377, Code of Alabama, 1940

Perjury and subornation in other cases.

Any person who wilfully and corruptly swears or affirms falsely, or corruptly procures another to so swear or affirm, in regard to any material matter or thing, upon any oath or affirmation authorized by law, except on the trial of any person under an indictment for a felony, shall, on conviction, be imprisoned in the penitentiary for not less than two or more than five years.

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VI

Title 34, Section 27, Code of Alabama, 1940

For abandonment, twelve months' residence to be proved.

No bill can be filed for a divorce on the ground of voluntary abandonment, unless the party applying therefor, whether husband or wife, has been a bona fide resident citizen of this state for twelve months next preceding the filing of the bill which must be alleged in the bill and proved; provided however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action.

VII

Title 34, Section 29, Code of Alabama, 1940

If defendant a nonresident, a year's residence by plaintiff must be proved.

When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill,which must be alleged in the bill and proved; provided however, the provisions of this section shall not be of force and effect when the court has jurisdiction of both parties to the cause of action.

VIII

Title 46, Section 43, Code of Alabama, 1940

Duties of attorneys. It is the duty of attorneys:

1. To support the constitution and laws of this state, and of the United States.
2. To maintain the respect due to courts of justice and judicial officers.

3. To employ for the purpose of maintaining the causes confided to them such means only as are consistent with truth, and never seek to mislead the judges by any artifice, or false statement of the law.

4. To maintain inviolate the confidence and at every peril to themselves to preserve the secrets of their clients.

5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party, or a witness, unless required by the justice of the cause with which they are charged.

6. To encourage neither the commencement nor continuance of any action or proceeding from any motive of passion or interest.

7. Never to reject for any consideration personal to themselves the cause of the defenseless or oppressed.

IX

Title 46, Section 25, Code of Alabama, 1940

The board of commissioners shall have power: (a) To determine, by rules, the qualifications and requirements for admission to the practice of law: (b) to conduct through a board of examiners, hereinafter provided for, the examination of applicants; and such board of examiners shall certify to the supreme court the names of the applicants found to be qualified; such certifications shall entitle such persons to be enrolled in the bar of the state and to practice law, provided the fees hereafter required are paid; (c) subject to the approval of the supreme court, to formulate rules governing the conduct of all persons admitted to practice, and to investigate, or cause to be investigated, and to pass upon, all complaints that may be made concerning the professional conduct of any person who has been, or may hereafter be, admitted to the practice of the law; (d) subject to the approval of the supreme court, to formulate rules governing the re-instatement of members of the bar who have been disbarred, and to pass upon all petitions for reinstatement; (e) to appoint one or more committees from the membership of the board, or from the

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membership of the entire bar, or partly from one and partly from the other, to take evidence in connection with any complaint filed against any attorney and forward the same to the board. In all cases, testimony with reference to such charges shall be taken at the courthouse of the county of the residence of the party charged, provided the evidence of witnesses residing outside of such county may be taken in the same manner as provided by law for the taking of depositions in civil cases. The state solicitor of the circuit in which such accused attorney resides shall prosecute any such charge or case, interrogate the witnesses, introduce the evidence in support of such charges, and, when requested by any member of the board, argue the cause before the board. The board shall administer such discipline, by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom, as the case shall, in their judgment warrant. A majority of the board shall constitute a quorum and the majority of those present (if a quorum be present) shall be empowered to act as and for the entire board. The supreme court may, and on petition of the party aggrieved must, in any case of suspension or disbarment from practice, review the action of the board, and may, on its own motion and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment. Rules regulating the manner of such review and providing for the certification of the evidence, or if the supreme court desire, the taking of additional evidence, shall be promulgated by said board and become effective upon approval by the supreme court. (f) To make such rules and by-laws not in conflict with any of the terms of this chapter concerning the selection and tenure of its officers and committees and their powers and duties, and generally for the control and regulation of the business of the board and of the state bar. (g) To hold and conduct educational and social meetings and activities among the members of the bar, to publish journals and generally to do such things as in their judgment may tend to improve the educational and ethical standing of bench and bar. (h) Should any vacancies occur on said board, to fill such vacancies by appointment of a member of the state bar from the judicial circuit in which said vacancy exists and such appointee shall hold for the time of the unexpired term or pending the election of his successor. (i) To establish circuit or branch associations

of the state bar and if circuit associations are established, the member of the board from said circuit shall be ex officio the president of such circuit association. Said circuit or branch association shall have no authority to suspend or disbar attorneys and in all matters shall be subordinate to the authority of the board. If any member of said board is a party to the preferment of charges for disbarment or suspension of any lawyer, or there exists as against any member of such board any cause provided by law for the disqualifications of judges or jurors in civil or criminal cases, such member shall be disqualified from sitting as a member of said board in the hearing of such charges. Said board shall have no authority, nor shall it in any way undertake, to regulate the fees or charges of lawyers for the rendition of their professional services.

X

RULE 25, SECTION A, as last amended.

Board of Commissioners of Alabama State Bar

25. No person heretofore or hereafter admitted to practice law in Alabama shall

(a) knowingly or willfully make any false representations of fact to any judge, court, or jury to induce a favorable action or ruling by either;

(b) File or prosecute or aid in the filing or prosecution of any suit, cross bill, or proceeding seeking a divorce in a Court in Alabama as attorney or solicitor for a complainant or cross complainant therein or serve as referring or forwarding attorney for such complainant or cross complainant with knowledge or reasonable cause to believe that neither party to such suit, cross bill, or proceeding is at the time of the filing of the bill of complaint or cross bill of complaint therein, a bona fide resident of the State of Alabama;

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(c) While acting as attorney for either party in any suit for divorce in any Court in Alabama represent to the Court or conspire with any party, attorney, or person to represent to the Court that either party to such suit is a bona fide resident of Alabama, knowing such representation to be false.

XI

RULE 36, SECTION A, as last amended.

Board of Commissioners of Alabama State Bar

36. No person licensed to practice law in the courts of the State of Alabama shall be guilty of any conduct unbecoming an attorney at law.

XII

RULE 16, SECTION A.

Board of Commissioners of Alabama State Bar

No person heretofore or hereafter admitted to practice law in Alabama shall...

16. Introduce or offer to introduce any testimony he knows to be false or forged.

XIII

RULE 18, SECTION B.

Board of Commissioners of Alabama State Bar

In the taking of testimony by the Grievance Committee of the Board or by a Commissioner, as herein provided, or by the Board, it shall not be required or necessary that objection be made to any evidence which may be offered by either party, but the Board shall consider only such evidence as is, in its opinion, relevant, material, or competent and it shall not consider any testimony which, in its opinion, is irrelevant, immaterial, or incompetent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969
NO. 1518

J. ROBERT HUIE,
Petitioner

vs.

BOARD OF COMMISSIONERS OF THE
ALABAMA STATE BAR,
Respondent

BRIEF OF RESPONDENT

Introduction

This Brief of Respondent is filed in opposition to a Petition for Writ of Certiorari to the Supreme Court of Alabama. The Respondent respectfully submits that the Petitioner has failed to present any federal question of substance not heretofore determined by this Court or decided in a way probably not in accord with applicable decisions of this Court.

QUESTION PRESENTED

The Respondent submits that the question presented is more clearly and accurately stated as follows:

> Does the due process clause of the Fourteenth Amendment, United States Constitution, prohibit the Supreme Court of Alabama from enacting Rules Governing the Conduct of Attorneys in Alabama proposed by the Board of Commissioners of the Alabama State Bar; prevent the Alabama State Bar, acting through its committees and officers who are not members of the Board, from investigating, charging, and prosecuting an attorney for violations of the Rules; and prevent the Board of Commissioners of the Alabama State Bar from determining guilt or innocence where the Supreme Court of Alabama has independently reviewed the record with no presumptions as to the correctness of the Board's findings of law or fact?

Constitutional Provisions, Statutes and Rules Involved

In addition to the constitutional provisions, statutes and rules set forth in the Appendix to the Petition for Writ of Certiorari, the Respondent calls the following to the attention of the Court as set forth below in the Argument and Appendix to this Brief of Respondent:

1. Rule 8, Revised Rules of the Supreme Court of the United States

2. Rule 46 (b), Federal Rules of Appellate Procedure

3. Article 6, Section 139, Constitution of Alabama, 1901

4. Title 46, Section 33, Code of Alabama, 1940

5. Rule 37, Section A, Rules Governing the Conduct of Attorneys in Alabama

6. Rule 3, Section B, Rules Governing the Conduct of Attorneys in Alabama

7. Rule 22, Section B, Rules Governing the Conduct of Attorneys in Alabama

STATEMENT OF THE CASE

The Statement of the Case appearing in the Petition for Writ of Certiorari contains no factual inaccuracies, and Respondent will not restate the same herein, except to observe that Petitioner was given due notice of all proceedings and was represented throughout by able counsel.

SUMMARY OF ARGUMENT

The questions presented for review in the Petition for Writ of Certiorari to the Supreme Court of Alabama in Sullivan v. Board of Commissioners of the Alabama State Bar, 38 U. S. L. Week 1468 (U. S. Oct. 13, 1969) were substantially identical to those which the Petitioner now seeks to present, and this Court should not be required to consider repeated petitions which only differ primarily in phraseology and arrangement.

Disciplinary proceedings against attorneys are not "criminal prosecutions" within the meaning of the Sixth Amendnent, United States Constitution.

The Petitioner is in error in describing the Board of Commissioners of the Alabama State Bar as a "non-judicial body" since Article 6, Section 139, Constitution of Alabama, 1901, expressly provides that such a body may be vested with powers "of a judicial nature" and the courts have held that the Board possesses judicial powers. Ex parte Thompson (1933) 228 Ala. 113, 152 So. 229, Sullivan v. Alabama State Bar, et al., 295 F. Supp. 1221, Aff'd., 394 U. S. 812.

Rule 25, Section A, Rules Governing the Conduct of Attorneys in Alabama, which prohibits an attorney from obtaining a divorce "with knowledge or reasonable cause to believe"

that neither party is a resident merely implements a long established policy that attorneys shall not practice frauds upon the courts and does not deprive "divorce lawyers" of the equal protection of the laws.

The fact that certain members of the Board of Commissioners of the Alabama State Bar voted to propose to the Supreme Court of Alabama for adoption the Rule which the Petitioner was found guilty of violating, although they did not entertain any personal bias against the attorney or preconceived convictions as to his guilt or innocence, did not deprive Petitioner of a fair and impartial tribunal, the Supreme Court of Alabama having affirmed the Board's action without any presumption as to the correctness of the Board's findings.

Title 46, Section 33, Code of Alabama, 1940, expressly provides that the Board of Commissioners of the Alabama State Bar may employ counsel to prosecute before it charges against an attorney, and the Petitioner was not denied due process or a fair hearing because the Board acted pursuant to the terms of this statute.

Depositions are admissible in disciplinary proceedings against an attorney, such proceedings not being "criminal prosecutions" resulting in fine or imprisonment, but having as their sole function the purging of the role of legal practitioners of unworthy members.

Rule 36, Section A, Rules Governing the Conduct of Attorneys in Alabama, which prohibits "any conduct unbecoming an attorney at law" is a valid rule, Rule 3, Section B, providing that an attorney must be charged in writing with a specification of conduct which will fairly and reasonably give the accused information of the acts or offenses complained of.

Petitioner having failed to assert a right to trial by jury in the Supreme Court of Alabama, cannot now assert this alleged right for the first time in the Supreme Court of the United States. There exists no right to trial by jury in a disciplinary proceeding against an attorney since such proceeding is not a "criminal prosecution".

The criminal standard of proof beyond a reasonable doubt is not required in a disciplinary proceeding against an attorney.

The "one man-one vote" rule does not apply to the Board of Commissioners of the Alabama State Bar and there is no unfairness in the composition of said Board, a judicial body.

Both the Board of Commissioners of the Alabama State Bar and the Supreme Court of Alabama are required to consider only "relevant, material, or competent" evidence thus insuring that an attorney's discipline will not be based upon inadmissible evidence.

The fact that a member of the Alabama State Bar presided in the taking of testimony did not result in any unfairness to the Petitioner since the merits of the case were decided by the Board of Commissioners and the Supreme Court of Alabama.

There is no denial of federal due process in the disbarment of an attorney because of his perpetrating a fraud upon the court in the prosecution of a divorce case.

ARGUMENT

This proceeding is somewhat unusual in at least two respects.

First ---- The Supreme Court of Alabama in rendering a decision adverse to the Petitioner as to each question presented relied upon its prior opinion in In re Sullivan (1969) 283 Ala. 514, 219 So. 2d 346, cert. den. Sullivan v. Board of Commissioners of the Alabama State Bar, 38 U.S. L. Week 1468 (U.S. Oct. 13, 1969). As a convenience and aid to the Court a copy of the opinion in In re Sullivan is attached hereto in Appendix infra pp. A-1 through A-22.

Second ---- The Petition for Writ of Certiorari in Sullivan v. Board of Commissioners of the Alabama State Bar, supra, was in many respects identical to the pending petition in the instant proceeding. The only real difference between the two petitions is found in the fact that in Sullivan argument was presented under seven distinct "Questions Presented For Review", whereas in the present proceeding one omnibus "Question Presented For Review" is followed by eleven subdivisions of argument A through K pp. 17-25. As a matter of fact, Question VII in Sullivan was fundamentally indistinguishable from the single question now presented. Question VII in Sullivan read as follows:

"Whether or not the procedures regulating disciplinary proceedings in the State of Alabama, wherein the Board of Commissioners of the Alabama State Bar formulates rules, and acts, directly or indirectly, as accuser, prosecutor, judge and jury, are consistent with the due process clause of the Fourteenth Amendment, United States Constitution."

The question was rephrased in the Brief of Respondent in the following language:

"Does the due process clause of the Fourteenth Amendment, United States Constitution, prohibit the Supreme Court of Alabama from enacting Rules Governing the Conduct of Attorneys in Alabama proposed by the Board of Commissioners of the Alabama State Bar and prohibit said Board from acting through its committees and officers in investigating, charging and determining the guilt or innocence of an attorney of alleged violation of such Rules?"

The other "Questions Presented for Review" in Sullivan and the rephrasing of the same in the Brief of Respondent were as follows:

Petitioner's Question I in Sullivan

"Whether or not a defendant in a state bar disciplinary proceeding, who received the ultimate penalty of disbarment, was tried before a fair and impartial tribunal, consistent with the Sixth and Fourteenth Amendments, United States Constitution, where certain members of that tribunal for determining guilt or innocence had voted previously for adoption of the rule defendant was determined to have violated." (See Section B of the pending petition, pp. 20-21)

Respondent's Question A in Sullivan

"Where the Board of Commissioners of the Alabama State Bar in a disciplinary proceeding, which is not a criminal prosecution, found an attorney guilty of violating one of the Rules of

the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama and the Supreme Court of Alabama affirmed the Board's action without any presumption as to the correctness of the Board's findings, is a substantial constitutional question raised under the Sixth and Fourteenth Amendments, United States Constitution, because certain members of the Board voted to propose to the Supreme Court of Alabama for adoption the Rule which the attorney was found guilty of violating, although they did not entertain any personal bias against the attorney or preconceived convictions as to his guilt or innocence?"

Petitioner's Question II in Sullivan

"Whether or not in a state bar disciplinary proceeding, where the penalty imposed was the ultimate one of disbarment, depositions could be used as evidence against the defendant consistent with the Sixth and Fourteenth Amendments, United States Constitution." (See section D of the pending petition, p. 22)

Respondent's Question B in Sullivan

"Does the use of depositions in a disciplinary proceeding against an attorney, which proceeding is not a criminal prosecution and can result in a reprimand, suspension or disbarment, but cannot result in fine or imprisonment, raise a substantial constitutional question under the Sixth and Fourteenth Amendments, United States Constitution?"

Petitioner's Question III in Sullivan

"Whether Rule 36, Rules Governing the Conduct of Attorneys in Alabama, which condemns

'any conduct unbecoming an attorney at law' and makes an attorney subject to discipline therefor, sufficiently establishes a standard of conduct reasonably ascertainable and definite to afford a constitutional guide or standard for an attorney consistent with the due process clause of the Fourteenth Amendment, United States Constitution." (See Section E of the pending petition, p. 23)

Respondent's Question C in Sullivan

"Do the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama offend the due process clause of the Fourteenth Amendment, United States Constitution, where Rule 36, Section A, condemns 'any conduct unbecoming an attorney at law', but Rule 3, Section B, requires that a complaint against an attorney must charge in writing 'that such an attorney has violated or failed to comply with one or more of the rules, referring to such rule or rules by the numbers' and with 'such specification of the conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of?' "

Petitioner's Question IV in Sullivan

"Whether an attorney in a disciplinary proceeding prosecuted by a state bar association which resulted in his disbarment is entitled to a trial by jury in accordance with the provisions of the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution." (See Section F of the pending petition, p. 23)

Respondent's Question D in Sullivan

"Does the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment require a trial by jury in a disciplinary proceeding which is not a criminal prosecution and can result only in a reprimand, suspension or disbarment and not in a fine or imprisonment?"

Petitioner's Question V in Sullivan

"Whether or not an attorney, consistent with the due process and equal probation clauses of the Fourteenth Amendment, United States Constitution, may be proceeded against in a disbarment action where the thrust of the complaint against him is a violation or violations of a rule of conduct of the Board of Commissioners of the Alabama State Bar, approved by the Supreme Court of Alabama, which rule is contra to the interpreted statutory law of the State of Alabama." (We find no specific argument directed to this question in the pending petition, unless the material at pp. 19-20 can be so considered)

Respondent's Question E in Sullivan

"Where the statutory law of the State of Alabama as interpreted by The Supreme Court of Alabama requires that at least one party to a divorce proceeding be a bona fide resident of the State of Alabama, does Rule 25, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, which prohibits attorneys from introducing perjured testimony

on the issue of residency 'with knowledge or reasonable cause to believe' that such testimony is false, raise a substantial federal question under the due process and equal protection clauses of the Fourteenth Amemdment of the United States Constitution?"

Petitioner's Question VI in Sullivan

"Whether or not Rule 25, Section A, as last amended, Rules of the Board of Commissioners of the Alabama State Bar, which rule concerns the granting of divorces in the State of Alabama, is consistent with the freedom of religion clause of the First Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution." (We find no argument directed to this question in the pending petition)

Respondent's Question F in Sullivan

"Does the First Amendment of the United States Constitution which prohibits any 'law respecting an establishment of religion, or prohibiting the free exercise thereof'; as made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution, require a state to permit divorce by the mere consent of the parties and without regard to their residency?"

The Questions Presented For Review in Sullivan v. Board of Commissioners of the Alabama State Bar, supra, as phrased therein by both the petitioner and respondent, are

set forth above in order to illustrate the striking similarity between that proceeding and the pending proceeding. Assuming, arguendo, that a denial of certiorari does not adjudicate the merits of the questions presented, it must be res judicata as to something, i.e., the advisability of granting the writ. This Court's valuable time should not be consumed in considering substantially identical petitions, filed within months of each other, and differing primarily in phraseology and arrangement.

Since the Petitioner has lumped all of his arguments under one all encompassing question, this Brief of Respondent will direct argument to each subdivision of the Petition, seriatim.

At the outset it should be noted that two fallacious premises pervade the Petitioner's entire argument. (a) Petitioner assumes that disciplinary proceedings against attorneys are, or should be treated as, "criminal prosecutions". (b) Petitioner assumes that the Board of Commissioners of the Alabama State Bar is a "non-judicial body".

In view of the fact that these false premises underlie much of the Petitioner's argument, they should be disposed of at the beginning.

(a)

Disciplinary Proceedings Against Attorneys Are Not "Criminal Prosecutions"

We must look to no less an authority than the Supreme Court of the United States for an answer to this question. As early as 1869, in

holding that a judge was not civilly liable for his removal of an attorney as an officer of the Court, this Court in Randall v. Brigham, 74 U.S. 523, described the nature of disbarment proceedings as follows:

> "All that is necessary to their validity is that --- notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

In rejecting the claim that the attorney had been denied certain rights afforded defendants in criminal prosecutions under the Massachusetts Constitution, the court observed:

> ".....It has held that the proceeding taken for the removal of the plaintiff could not, in any just and proper sense, be deemed a criminal procedure, in which a party has a right to a full, formal and substantial description of the offense charged; and that it was not essential to the validity of the order of removal that it should be founded on legal process, according to the signification of the words 'per legam terrae' as used in the Magna Charta, or in the Declaration of Rights."

In discharging a rule to show cause why a disbarment order of a United States District Judge should not be vacated, this Court in Ex parte Wall, 107 U. S. 265, stated:

> "The proceeding is, in its nature, civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them."

Petitioner appears to rely to a large extent upon Pointer v. Texas, 380 U.S. 400, Duncan v. Louisiana, 391 U.S. 145, and Bloom v. Illinois, 391 U. S. 194. These cases are clearly distinguishable.

Pointer is the only case cited by the Petitioner which even touches on the Sixth Amendment right to confrontation. The case merely holds that the transcript of the testimony of a complaining witness given at a preliminary hearing, at which the defendant, a layman, who had no counsel, did not cross-examine, is inadmissible at the defendant's trial for the crime of robbery. The Petitioner in the instant case, an attorney, has been represented throughout all proceedings by able counsel and all witnesses have been subjected to thorough cross-examination.

Duncan involved a criminal prosecution in the classical sense, a simple battery, which under Louisiana law is a misdemeanor punishable by a maximum of two years imprisonment and a $300 fine. The case holds that trial by jury in criminal cases is fundamental to the American scheme of justice and that the Fourteenth Amemdnemt guarantees a right of a jury trial in all criminal cases which -- were they to be tried in federal court -- would come within the Sixth Amendment's guarantee, and that a crime punishable by two years imprisonment is a serious crime requiring a jury trial, and not a mere petty offense.

In Bloom it was held that prosecutions for serious criminal contempts are subject to the jury trial provisions of the Federal Constitution, and the Sixth Amendment, which is made binding on the states by virtue of the due process clause of the Fourteenth Amendment. The defendant's demand for a jury trial had been denied in the state court, and he was found guilty and sentenced to 24 months imprisonment. The opinion carefully notes that a criminal contempt proceeding is exactly parallel to a criminal prosecution in the classical concept, in both its objectives and results.

> ".....serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States....."
>
> "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fines or imprisonment or both....."
> "Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical -- protection of the institutions of our government and enforcement of their mandates."

Pointer and Duncan involved "criminal prosecutions" and Bloom was concerned with

criminal contempt which "------is a crime in the ordinary sense -----"

In contrast, all courts have held consistently that an investigation of the conduct of an attorney is not a criminal proceeding.

(b)

Article 6, Section 139, Constitution of Alabama, 1901, provides that a body such as the Board of Commissioners of the Alabama State Bar may be vested with powers of a judicial nature"

In 1933 the Supreme Court of Alabama upheld the validity of the statutes (Title 46, Section 21, et seq., Code of Alabama, 1940) creating the Alabama State Bar and vesting the Board of Commissioners with certain powers and duties. Ex parte Thompson (1933) 228 Ala. 113, 152 So. 229. In the opinion the court quoted from Article 6, Section 139, Constitution of Alabama, 1901, the pertinent part reading: "The judicial power of the state shall be vested in ------such persons as may be by law invested with powers of a judicial nature ------", and observed "Thus we find express constitutional warrant for conferring upon this Board judicial functions; -----"

Section 1 of the Petition For Writ of Certiorari (pp. 15-17) contains the citation of four cases, namely, In re Schlesinger (1963) 404 Pa. 584, 172 A. 2d 835, In re Garland (1866), 71 U. S. 333, Ruiz v. Delgado (CA 1, 1966), 359 F 2d 718, and In re Murchison (1955), 349 U.S. 133.

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(1) In re Schlesinger involved the reversal of an order disbarring an attorney where numerous errors were apparent in the record including the refusal of certain proffered evidence by the accused attorney, erroneous conclusions of law, and insufficient evidence. The most glaring error was found in the fact that the accused attorney was charged by a Committee on Offenses of the Court of Common Pleas and then tried before a Sub-Committee composed of three members of the identical committee which had preferred the charges. Petitioner takes comfort in the language of the opinion that "A disbarment proceeding is every bit as serious as a criminal trial and often more so; --------" A careful reading of the opinion will readily indicate that the court did not, in fact, treat the proceeding as a criminal prosecution, since none of the procedural safeguards peculiar to criminal trials were even alluded to. This is the only case cited by the Petitioner which even goes so far as to draw an analogy between a disciplinary proceeding and a criminal prosecution.

(2) In re Garland dealt with the constitutionality of an act of Congress of 1865 which required a certain prescribed oath from attorneys for continued admission to practice before any United States Court, and defined the exclusion of attorneys from the practice of law as a judicial power. Assuming that the power to exclude from practice before the Federal Courts is the exclusive judicial prerogative of the Federal Courts, we fail to grasp its significance in the instant case.

(3) Ruiz v. Delgado held invalid as a denial of due process a procedure in the Peurto Rico District Court whereby the judge acted as prosecuting attorney in examining and cross-examining witnesses, and thereafter sat in judgment and decided the case. None of the procedures in the present case are even remotely similar to this, and again we fail to see the significance.

(4) In re Murchison condemned the practice whereby the same judge presiding at a contempt hearing had also served as a "one-man grand jury" out of which the contempt charges arose. Again nothing analogous to this appears in the disciplinary proceedings involving the Petitioner.

A

The first portion of division A of the Petition for Writ of Certiorari (pp. 17-19) appears to present an argument that Title 34, Section 29, Code of Alabama, 1940, prior to the amendment thereof in 1945 was unconstitutional. The 1945 proviso dispensed with a one year residency requirement where the defendant is a non-resident "------when the court has jurisdiction of both parties to the cause of action." We fail to comprehend the relevance of this.

Petitioner then quotes from his brief on submission to the Supreme Court of Alabama for the proposition that divorce attorneys are denied the equal protection of the law. Respondent responds with the following quote from its brief:

"Seemingly, the Petitioner has erroneously made the assumptions: (a) that the 'bank lawyer', 'insurance lawyer', 'railroad lawyer', or 'damage suit lawyer' who submits evidence to a court with knowledge or reasonable cause to believe it is false is immune from discipline, whereas the divorce lawyer is subject to discipline; and (b) that the 'divorce lawyer' who obtains a divorce when in fact neither complainant nor respondent is a resident is, ipso facto, subject to discipline. The 'bank lawyer', 'insurance lawyer', 'railroad lawyer', and 'damage suit lawyer' is not permitted to perpetrate fraud upon the court with impunity. The 'divorce lawyer' is not subject to discipline if he innocently obtains a divorce for non residents.

"The 'quickie divorce' racket in Alabama had become a national scandal. Amended Rule 25, Section A, was an expression by the Alabama State Bar through its Board of Commissioners, approved by the Supreme Court of Alabama, that efforts would be made to eradicate the evil.

"The gravaman of the offense condemned by Amended Rule 25, Section A, is the attorney's 'knowledge or reasonable cause to believe' that jurisdiction, the initial access to the courthouse door, is being gained by falsehood.

"Policy has always dictated that lawyers must be disciplined for participating in a fraud upon the courts. Amended Rule 25, Section A, merely implemented that policy when a grave situation arose."

B

The Petitioner does not contend that any member of the Board of Commissioners of the

Alabama State Bar entertained any personal bias as to the Petitioner, and the record reflects that the members of the Board of Commissioners were impartial in this regard. The Petitioner does not contend that any member of the Board of Commissioners entertained any preconceived convictions concerning the Petitioner's guilt or innocence of the charges, and the record reflects that the Commissioners were impartial in this respect.

The bias which would disqualify a member of the Board from sitting and hearing charges against an attorney must be bias personal to the accused attorney, and the mere fact that a member of the Board might favor the particular Rule which the attorney is charged with violating is of no consequence. It might be safely assumed that all members of the Board advocate the enforcement of all of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, and this assumption might equally apply to the Justices of the Supreme Court of Alabama, who adopted the Rules and thus gave them validity.

To insure a fair and impartial tribunal, Title 46, § 25, Code of Alabama, 1940, provides that "If any member of said Board is a party to the preferment of charges for disbarment or suspension of any lawyer, or there exists as against any member of such Board any cause provided by law for the disqualifications of judges or jurors in civil or criminal cases, such member shall be disqualified from sitting as a member of said board in the hearing of such charges." This statutory provision expressly insures to an

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accused attorney a fair and impartial tribunal. The Petitioner does not contend that the statute has not been followed.

Wilson v. State, 243 Ala. 1, 8 So. 2d 422, cited by the Petitioner, involved a criminal prosecution a murder trial, and the alleged bias of the challenged juror was based upon facts completely dissimilar to those in the instant case. Shapiro v. The City of Birmingham, 30 Ala. App. 563, 10 So. 2d 38, also cited by the Petitioner, is completely inapposite; it dealt with the violation of a city ordinance and the challenged juror was an employee of the plaintiff city, a policeman charged with the duty of enforcing the ordinance.

Certainly, no substantial question is posed under the Sixth and Fourteenth Amendments, United States Constitution.

C

True, Title 46, Section 25, Code of Alabame, 1940, contains a provision whereby the circuit solicitor is authorized to prosecute disciplinary proceedings. However, this section must be read in pari materia with Title 46, Section 33, Code of Alabama, 1940, which expressly provides "-------The board of commissioners may appoint counsel to prosecute before it any such complaint or charge so preferred before it against an attorney, and may within its discretion fix and order paid reasonable compensation." Petitioner is careful to state that the counsel for the Bar should not be faulted, but that the Board of Commissioners must be deemed the culprit. The court below stated " -----counsel for Huie ably and vigorously represented him and

filed numerous motions and objections -------"
Both the Board and the Grievance Committee welcomed this. It was in the finest tradition of the Alabama State Bar. A careful review of the record will demonstrate that Petitioner was treated with the utmost fairness and given every opportunity to defend. Petitioner's statement that the proceedings "stink" is somewhat shocking.

D

The Supreme Court of Alabama approved the use of depositions upon the authority of its prior decision, in Sullivan. The courts of other states have held that depositions are admissible in disciplinary proceedings against attorneys, such proceedings not being "criminal prosecutions" resulting in fine or imprisonment, but having as their sole function the purging of the role of legal practitioners of an unworthy or disreputable member. State ex rel. Kehoe v. McRae, 49 Fla. 389, 38 So. 605; State v. Mosher, 128 Iowa 82, 103 N. W. 105.

Clearly the due process clause of the Fourteenth Amendment does not render depositions inadmissible in a proceeding resulting in the revocation of a professional license. In Missouri ex rel. Horwitz v. North, 271 U. S. 40, a Missouri statute was upheld which authorized the State Board of Health to revoke licenses to practice medicine for certain specified causes and provided that: "Testimony may be taken by deposition to be used in evidence at the trial of such charges before the Board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases." Petitioner cites no authority for the proposition that depositions are inadmissible in disciplinary proceedings.

See the discussion of Pointer v. Texas, supra, Duncan v. Louisiana, supra, and Bloom v. Illinois, supra, at pp 16-18 of this Brief of Respondent.

E

Petitioner was found guilty of Charges Seven, Eight, and Nine. Charge Nine alleged a violation of Rule 36, Section A, which condemns "any conduct unbecoming an attorney at law". To test the validity of Rule 36, Section A, it must be read in pari materia with the entire body of the Rules, which describe in Section A the actions on the part of attorneys which are specifically required or prohibited and in Section B, sets forth the method of procedure to be followed in the investigation and trial of complainants.

Rule 3, Section B, provides:

> "It shall be sufficient for any complaint against any attorney to charge in writing that such an attorney has violated or failed to comply with one or more of the rules, referring to some rule or rules by the numbers hereinabove set forth, and such specification of conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of". (Emphasis added).

It is thus obvious that an attorney is afforded an opportunity to (a) establish that he did not perform the acts which are the subject of the complaint, and (b) if the acts are admitted, establish that the acts do not constitute a violation of a specific rule.

The Board of Commissioners of the Alabama State Bar, which promulgated the Rules, and the Supreme Court of Alabama, which approved the Rules and gave them validity, felt that a basically dishonest but ingenious individual might carefully pattern his conduct so as to circumscribe, though narrowly, every Rule other than Rule 36, Section A, and nevertheless, be guilty of conduct which deserved, if not demanded, discipline. It was felt that in dealing with an honorable profession rather than a purely commercial trade, some comprehensive rule was necessary, in order to prevent the fundamentally unethical from carefully avoiding the violation of some specific rule, but whose actions manifestly demonstrated a breach of the high standards demanded of attorneys as officers of the courts.

To demonstrate that other courts are in agreement with this view, we need look to no less an authority than the Supreme Court of the United States. Rule 8, Revised Rules of the Supreme Court of the United States, provides:

> "Where it is shown to the court that any member of its bar .....has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court." Applied in In re Baker, 297 U. S. 691

Rule 46 (b) Federal Rules of Appellate Procedure, is substantially identical (B-1).

Statutes, rules of court, or rules promulgated by bar associations, which are similar, if not identical, to Rule 36, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, exist in many states. The discipline of a professional group would be difficult, if not impossible, without a rule of similar import.

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The qualities of character which entitle one to become an attorney and officer of courts of a state and a member of the bar of the Supreme Court of the United States must be stated in general terms rather than confined to a series of precise and specific "Thou shalt nots."

"The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect". Konigsberg v. State Bar of California, 353 U. S. 252; Schware v. Board of Bar Examiners of New Mexico, 353 U. S. 232.

Rule 36, Section A. Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama prohibiting "conduct unbecoming an attorney at law," and Rule 8, Revised Rules of the Supreme Court of the United States prohibiting "conduct unbecoming a member of the bar of this court," when measured against a background of experience extending over centuries of development of standards of honesty and fairness of members of an honorable profession is even more definitive than "good moral character", a test for admission to the bar which has been specifically upheld.

In the case of Ex parte Secombe, 60 U.S. 9, a rule to show cause why the peremptory writ of mandamus should not issue commanding the Judges of the Supreme Court of the Territory of Minnesota to restore an attorney to his office was denied. The opinion pointed out that a Minnesota statute described in only general terms some of the offenses for which attorneys might be removed, and observed:

> "Indeed, it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney

> or counselor ought to be removed. And the Legislature, for the most part, can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice, as cases may arise."

We again emphasize that the Rules must be read as a whole. If an attorney entertains doubts as to the ethical propriety of contemplated action, he is adequately protected by Rule 37, Section A, which provides:

> "But no attorney shall be subject to disciplinary measures for any action on his part, who, prior to such action has received from the Grievance Committee its written opinion that such action was justifiable or permissible."

Petitioner's challenge of Rule 36, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama raises no substantial federal question under the due process clause of the Fourteenth Amendment, United States Constitution.

F

The alleged right to trial by jury was never contended before the Supreme Court of Alabama in briefs or in oral argument, and a reading of the opinion below will readily reveal that this proposition was never even considered. Petitioner cannot assert this right for the first time before the Supreme Court of the United States when the

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Supreme Court of Alabama was given no opportunity to pass upon his claim.

The Petitioner again erroneously assumes that the objective and result of an inquiry by the judicial department of a state or the federal government into the qualifications of an officer of the courts is to mete out "punishment". This contention has been emphatically refuted by every court which has addressed the subject. Randall v. Brigham, supra, and Ex parte Wall, supra.

The Supreme Court of the United States and other federal courts have disciplined attorneys as members of their respective bars and no right to trial by jury has been afforded by virtue of the provisions of the Sixth Amendment, United States Constitution, which guarantees such right "In all criminal prosecutions....." The Petitioner does not claim that such right to jury trial existed at common law at the time of the adoption of the Constitution of the United States.

It would present a strange anomaly if the Fourteenth Amendment, which makes the Sixth Amendment applicable to the State of Alabama, required the state courts to afford a jury trial in a disbarment proceeding while the Sixth Amendment, of its own force, imposed no such requirement upon the federal courts.

G

Rule 22, Section B, Rules Governing the Conduct of Attorneys in Alabama states: "The rules of evidence and degree of proof applicable to civil cases shall apply in all cases before the

Board"; that the criminal standard of proof beyond a reasonable doubt is not required is clearly established. Randall v. Brigham, supra; Ex parte Wall, supra.

H

Petitioner observes that Sullivan v. Alabama State Bar, et al., 394 U. S. 812, shows the innate unfairness of the composition of the Board of Commissioners of the Alabama State Bar, "a non-judicial body" (p. 24) The holding of the case is directly contrary to the proposition for which it is cited by the Petitioner. The United States District Court stated "The powers conferred upon the Board of Commissioners of the Alabama State Bar are more judicial than legislative in nature. They were so treated by the Supreme Court of Alabama in the case of Ex parte Thompson, 1933, 228 Ala. 113, 152 So. 229, 238, 239, 107 A. L. R. 671." 295 F. Supp. 1221. The members of the Board are competent men elected by their fellow attorneys from the various judicial circuits. There is nothing magic about a descriptive designation. They are no less able or "learned in the law" because they are denominated "commissioners" rather than "judges" or "justices".

I

Rule 18, Section C, Rules Governing the Conduct of Attorneys in Alabama, limits the Board of Commissioners of the Alabama State Bar to a consideration of only "relevant, material, or competent" evidence, and the Supreme Court of Alabama is similarly limited. Ex parte Montgomery (1943), 244 Ala. 91, 12 So. 2d 314.

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Petitioner's false assumption that the Board is a "non-judicial body" has already been discussed herein.

J

The fact that a member of the Alabama State Bar presided as commissioner at the taking of testimony did not result in any unfairness to the Petitioner. The Board and the Supreme Court of Alabama decided the case upon the merits. See the discussion of this point in Sullivan, appendix hereto, A-15, 16.

K

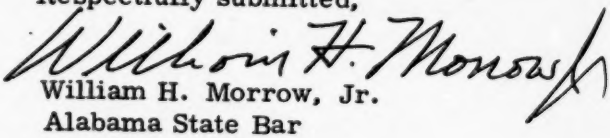
Petitioner departs from the record in this case when he asserts that the Grievance Committee has not proceeded against an attorney unless it could prove at least 50 violations of Rule 25, Section A. Respondent can think of no good reason why the Grievance Committee should wait until an attorney has perpetrated a fraud upon the courts at least 50 times before acting.

CONCLUSION

The Petitioner makes the bald assertion that the procedures employed by the Board of Commissioners of the Alabama State Bar and the Supreme Court of Alabama are strikingly similar to the methods used by the High Commission in England in the latter part of the Sixteenth Century in exposing heretics. This statement by Petitioner demonstrates the absurdity of his position. The Petitioner sets

forth no single novel issue but relies upon a culmination of procedural steps, each of which has been upheld as valid and which insure an accused attorney of every opportunity to prove his innocence of the charges and present any defense available to him. For the reasons stated herein, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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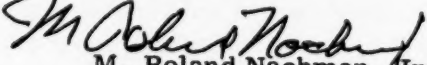

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APPENDIX

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THE STATE OF ALABAMA
THE SUPREME COURT OF ALABAMA
JUDICIAL DEPARTMENT
OCTOBER TERM, 1968-69

3 Div. 277

In the Matter of Thomas W. Sullivan
(Re Thomas W. Sullivan v. Board of
Commissioners of Alabama State Bar)

Petition for Review

PER CURIAM

This is a review of an order or resolution of the Board of Commissioners of the Alabama State Bar finding Thomas W. Sullivan guilty of certain charges preferred against him and disbarring him as a practicing attorney at law.

As originally filed the complaint against Sullivan contained four charges. By subsequent amendments seven additional charges were added to the complaint.

Charge eight was withdrawn, and resolutions of not guilty were entered by the Board of Commissioners as to charges one, two, three, four, ten, and eleven, and resolutions of guilty as to charges five, six, seven, and nine.

Charge five accuses the petitioner of violation of Rule 25, Section A, of the Rules Governing the Conduct

of all Persons admitted to the Practice of Law in the State of Alabama, in that in May or June 1962, the petitioner while serving as a referring or forwarding attorney, did in association with E. C. Boswell, submit to the Inferior Court of Geneva County, Alabama, a divorce case, namely Dominick Rugerrio v. Jean Rugerrio, Case No. A-256, wherein the bill of complaint and deposition of complainant represented to the Court that the complainant was a bona fide resident of the State of Alabama, when in truth and in fact, the petitioner knew, or had reasonable cause to believe, that neither the complainant therein nor the respondent was a bona fide resident of the State of Alabama.

Rule 25, Section A, as amended, reads as follows:

"No person heretofore or hereafter admitted to practice law in Alabama shall

(a) knowingly or willfully make any false representations of fact to any judge, court, or jury to induce a favorable action or ruling by either;

(b) file or prosecute or aid in the filing or prosecution of any suit, cross bill, or proceeding seeking a divorce in a Court in Alabama as attorney or solicitor for a complainant or cross complainant therein or serve as referring or forwarding attorney for such complainant or cross complainant with knowledge or reasonable cause to believe that neither party to such suit, cross bill, or proceeding is at the time of the filing of the bill of complaint or cross bill of complaint therein, a bona fide resident of the State of Alabama;

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(c) While acting as attorney for either party in any suit for divorce in any Court in Alabama represent to the Court or conspire with any party, attorney, or person to represent to the Court that either party to such suit is a bona fide resident of Alabama, knowing such representation to be false."

Charge Six charges petitioner by his acts in connection with the Rugerrio case, with violating Rule 16-A of the Rules Governing the Conduct of all Persons admitted to Practice in this State by introducing or offering to introduce testimony which he knew to be false or forged.

Charge Seven charges petitioner with conduct unbecoming an attorney in violation of Rule 36, Section A, as amended, governing the conduct of attorneys in Alabama.

Charge Nine is to the effect that on, to-wit, 27 December 1965, Mrs. Florence Nichols, then a resident of the State of Delaware, consulted with the petitioner in his office in Montgomery, Alabama, and was advised by petitioner that he could obtain an Alabama divorce for her within the near future. Mrs. Nichols thereupon paid petitioner $650.00 and then returned to Delaware. It is further charged that Mrs. Nichols has made numerous attempts to contact the petitioner by letter and telephone, and obtain information concerning her divorce; that a diligent search of the records of the Bureau of Vital Statistics of the State of Alabama, failed to disclose that petitioner has instituted any proceedings for divorce on behalf of Mrs. Nichols; that the petitioner's

acceptance of a fee from Mrs. Nichols, and his assurance that he would institute and prosecute a divorce action in violation of Rule 25, Section A, as amended, of the Rules of Conduct governing Attorneys in this State, and his failure to respond to inquiries from Mrs. Nichols, constituted conduct unbecoming an attorney in violation of Rule 36, Section A, governing the conduct of attorneys in this state.

Evidence

Charges Five, Six, and Seven (Ruggerio Divorce)

Mrs. Jean Ruggerio testified by deposition taken at Berkeley Heights, New Jersey, that she was a life-long resident of New Jersey. She had married Dominic Ruggerio and for over ten years prior to 10 December 1963, they had resided at Stonehouse Road, Basking Ridge, New Jersey.

On 10 December 1963, Mr. Ruggerio told her he had some papers from Alabama and he wanted her to sign them. He stated he wanted to go to Alabama and get a divorce--that some of his friends had gone to Alabama and gotten a divorce in a matter of a week. Mr. Ruggerio further told her he had seen a doctor and made arrangements to take a two weeks sick leave to go to Alabama to get the divorce.

On the envelope in which the papers were sent was the name Sullivan, though she did not remember the first name.

That night (10 December 1963) she and Mr. Ruggerio went before Harold Thompson (shown by other papers to be a notary public), and she signed the papers. Mr. Ruggerio left their home that night.

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About a week later Mr. Ruggerio called her at her mother's home. He said he was in Newark, and told her that things did not go in Alabama as he expected, and he wanted her to meet him at their home that night and talk things over. She went to their former home that night and Mr. Ruggerio told her he wanted her to return home, forget about everything, and start all over. However, she thought it best that they stay apart for awhile.

On 1 April 1964, she called Mr. Ruggerio at their former home and a girl answered the phone. She asked what she was doing there and the girl told her she and Mr. Ruggerio planned to get married. She asked her how she could when she (Mrs. Ruggerio) had not divorced him.

She called Mr. Ruggerio at his place of employment but he had left to go home. He later called her at her mother's home, and then came there. He handed her a divorce decree stating it was as legal a divorce as she could get.

This decree was rendered by the Inferior Court of Geneva County on 18 January 1964, in the case of Dominic Ruggerio v. Jean Ruggerio, submitted on the complaint of Dominic Ruggerio, and the answer and waiver of Jean Ruggerio, together with an affidavit by Dominic Ruggerio to the effect that he was a bona fide resident of Montgomery, Alabama, residing at 100 Commerce Street, that Jean Ruggerio was a non-resident of Alabama and had voluntarily abandoned him in 1961.

Mr. E. C. Boswell, a practicing attorney in Geneva, Alabama, testified that the Ruggerio divorce case was forwarded to him by the petitioner. Dominic

Ruggerio came to Geneva on 12 December 1963. The witness did not know how long Ruggerio had been in Geneva. Perhaps the petitioner came with him but he did not remember. Jean Ruggerio, to the witness' knowledge, did not come to Alabama. The witness represented Dominic Ruggerio in the divorce proceedings. Ruggerio made an affidavit stating he was a resident of Montgomery, Alabama, and that Jean Ruggerio, his wife, had voluntarily abandoned him on 7 June 1961. Other than the affidavit, the witness made no inquiry as to Ruggerio's residence. Ruggerio gave his testimony before the Register of the Inferior Court of Geneva County on 12 December 1963, and on 18 January 1964, the divorce decree was signed by the judge of said court. Mr. Boswell did not know how long Ruggerio remained in Geneva after appearing before the Register on 12 December 1963.

An affidavit of Judge William F. Thetford, Judge of the Fifteenth Judicial Circuit of Alabama, Montgomery County, was received in evidence. Judge Thetford deposes that he has been such judge since 1 November 1963, specifically assigned to hear domestic relations matters, including divorces. Continuously during his ,tenure the court dockets of said court have been current as to the processing of uncontested divorce cases. In proceedings involving a legitimate uncontested divorce, no more than a few hours, or at most one or two days, is required for disposition of such case.

Charge Nine (Nichols Matter)

Mrs. Florence Nichols, formerly Mrs. Florence Forcelli, testified before Maultsby Waller, the Commissioner appointed to take testimony upon the charges against the petitioner, that she first became acquainted with petitioner in February 1961,

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when she came to Alabama to get a divorce. She was then living in Danbury, Connecticut. On this occasion she was accompanied by Mr. Nichols. She and Nichols went to petitioner's office and she signed some papers. She returned to Connecticut and in April 1961, received from petitioner a copy of the decree divorcing her from Forcelli. Two weeks later she and Nichols were married.

In 1965, Mrs. Nichols had separated from Mr. Nichols and was living in Wilmington, Delaware. In the first part of December 1965, she telephoned petitioner, identified herself as having been Mrs. Forcelli and told petitioner she wanted to come to Alabama and get a divorce. Petitioner told her he would send her some papers in blank for Mr. Nichols to sign before a notary, and that his fee would be $650.00. She received the papers from petitioner and Nichols signed them before a notary public and returned them to her. She was supposed to mail the papers to petitioner who instructed her he would tell her when to come to Alabama.

However, Mrs. Nichols learned that some friends were driving to Tallassee, Alabama, on 24 December, 1965, and she decided to ride down with them.

On 26 December 1965, she drove to Montgomery and called petitioner, telling him she had the executed papers, and the fee, and was told to come to petitioner's office. There she talked with petitioner and signed three sheets of paper which were blank except for her name typed on the bottom.

She asked petitioner when she would "get the papers" (divorce decree) and he told her not to be alarmed if she didn't get them until around February as the judge he was going to get to "do it" was on vacation. Mrs. Nichols paid petitioner $650.00 in

cash, for which he gave her a receipt. The next day she returned to Tallassee, and from there returned to her home in Wilmington, Delaware.

The petitioner did not discuss with her any requirements as to residence in Alabama for divorce purposes.

Not having heard from the petitioner at the end of January 1966, she placed a call to petitioner's office but was told by his secretary he was out.

At the end of March, and again on 12 April 1966, she wrote to petitioner addressing the letters to petitioner's office in Montgomery. The envelopes bore her return address. She stated in each latter that she had not heard anything from petitioner, nor received any papers, and if anything was wrong to please notify her. She further told petitioner that if she were not going to get a divorce, she wanted her money back. She also recounted in her letters her efforts to reach petitioner by telephone. These letters were never answered, nor were they returned to her.

Mrs. Nichols moved from Wilmington back to Connecticut in April 1966, and prior to her departure she left her forwarding address in Wilmington. Since June 1966, she and Nichols have resumed their marital status.

The only witness called by petitioner testified before the Board of Commissioners on 3 March 1966. He testified that on 26 or 27 December 1965, he was in petitioner's office when a woman client came in. Petitioner asked the witness to wait outside his office. As the client left, he overheard her and

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petitioner discussing a divorce and petitioner told the woman her husband would have to sign some papers--that things were pretty hot in Alabama and "he couldn't jeopardize his law practice" and the petitioner discussed residency in Alabama.

On cross examination, the witness stated he did not remember the name of the woman, and he had first discussed this matter with the petitioner about a week before his appearance.

Assignments of Error

Assignment of error 11 is to the effect that the Board of Commissioners erred in overruling petitioner's objections denying the jurisdiction of the Board of Commissioners.

The petitioner, at the opening of the hearing before the Board of Commissioners of the Alabama State Bar, filed a pleading denying the jurisdiction of the Board to entertain the disbarment proceedings. Three grounds, A, B, and C, were set forth in support of the motion.

Ground A sets forth that there is a disparity of members of the Alabama State Bar among the thirty-six judicial circuits of Alabama, and therefore the composition of the Board is unconstitutional.

Ground B asserts that Rule 25, Section A, as amended, is invalid for the reason that the Board was unconstitutionally constituted.

These two grounds are argued jointly. It is petitioner's contention that since each judicial circuit elects one commissioner, and some circuits have a

relative few members of the bar, while others have a large number of members, the composition of the Board is malapportioned and violates the "one man one vote rule."

We have considered the cases cited by appellant in support of his contention above set out, particularly Baker v. Carr, 369 U. S. 186, 82 Sup. Ct. 691, 7 L. Ed 2d 663; Reynolds v. Sims, 377 U. S. 533, 84 Sup. Ct. 1362, 12 L. Ed. 2d 506; Ellis v. Baltimore, 234 Fed. Supp. 945, and others.

We do not consider that the doctrines announced in this line of cases were intended to apply to an association of a professional group, even though organized under the aegis of legislation, but were intended to apply to political governing bodies in the classical sense.

The organization of the Bar for the governing of the legal profession, and the administration of its duties is a matter peculiarly within the province of the Alabama Bar. We hold that the method of electing the Board of Commissioners is in no wise invalid.

The above disposes of petitioner's contention that Rule 25, Section A, as amended, is invalid for the reason that the Board of Commissioners was unconstitutionally constituted, i.e., malapportioned.

We observe, however, that even if it be assumed the petitioner's contention as to malapportionment of the Board contains merit, which we do not concede, it could not aid petitioner as laws passed by an malapportioned legislature are not invalid, Reynolds v. Sims, 377 U.S., supra; Horton v. Bomar, 335 F. 2d 583, nor are acts of a malapportioned county commission invalid, Avery v. Midland County, Texas, 390 U. S. 474, 88 Sup. Ct. 1114, 20 L. Ed. 2d 45, or acts of a

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possibly racially malapportioned draft board, Clay v. United States, (C.C.A. 5), 397 F. 2d 901; Nelloms v. United States, (C.C.A. 5), 399 F. 2d 295.

Further, the Board merely formulates rules, subject to approval by this court. Section 25 (c), Title 46, Code of Alabama 1940. The rules formulated by the Board and submitted to this court are not effective until approved by this court. In its ultimate sense, the Rules of the Bar are therefore the rules of this court, and it cannot be rationally argued that this court is malapportioned since the members are elected statewide.

Ground C of the motion is to the effect that the Board is unconstitutional in that it is instituted in violation of Sections 42 and 43 of the Alabama Constitution of 1901, guaranteeing the separation of powers of government into three magistracies, the legislative, the executive, and the judicial, and further that the Board is instituted in violation of Section 139 of our Constitution relative to vesting judicial power.

These points were decided adversely to petitioner's present contentions in Ex parte Thompson, 228 Ala. 113, 152 So. 229. Counsel for petitioner argues, however, that the decision in Ex parte Thompson is and should be re-examined and overruled. We are not in accord with this view but observe that upon a reading of the lengthy and exhaustive opinion in Thompson, we find nothing that questions its correctness.

Assignment of error III presents the question of the qualification of some eight members of the Board of Commissioners to sit in the present proceedings since they were members of the Board in 1961, at the time when Rule 25, Section A, as amended, was formulated by the Board of Commissioners.

A judge is not disqualified to try a case because he had been a member of the legislature enacting a statute involved in litigation before him, Norton v. Lyon Van and Storage Co., 9 Cal. App. 2d 199, nor does the fact that a prospective juror favors a statute, afford evidence that such juror is biased against a person accused of violating such statute. State v. Sullivan, 97 Wash. 639, 166 P. 1123. See also 48 C. J. S., Judges, Sec. 82, and 50 C. J. S. Juries, Sec. 244. By analogy those members of the Board who were also members at the time Rule 25, Section A was formulated were not, for that reason, disqualified to sit in the present proceedings.

Assignment of error V asserts error because of the action of the Board of Commissioners in denying petitioner's motion to suppress the deposition of Jean Ruggerio.

The grounds of such motion were that if the deposition were taken under the provisions of Title 7, Secs. 457, et seq., the deposition was faulty in that (1) no affidavit as to the necessity for taking such deposition was made before the proper official as required by Section 458 of Title 7, and (2) if the deposition was attempted under the provisions of Title 7, Secs. 474(1), et seq., it should be suppressed for the reason that such codal provisions are inapplicable to disbarment proceedings before the Board of Commissioners of the State Bar.

Counsel for the State Bar concedes that no affidavit was made prior to the taking of the Ruggerio deposition, but contend that the deposition was taken under the provisions of Title 7, Secs. 474(1), et seq. We can therefore lay aside any requirements of Sec. 458, Title 7, Code of Alabama 1940, in considering the point now argued.

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Sections 474(1)-474(18), Title 7, Code of Alabama 1940, appearing as Article 6A, in said Title 7, provides a cummulative method for the taking of depositions.

Section 474(1), Title 7, in parts pertinent to this review, provides:

> "Any party may take the testimony of any person, including a party, by deposition upon the oral examination for the purpose of discovery, or for use as evidence in the action or for both parties."

Section 474(4) provides that at the trial any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition, or who had due notice thereof.

Section 474(7) provides that a reasonable notice shall be given the other party of the time and place of the taking of the deposition, and the name and address of the person to be examined.

It is to be noted that no affidavit is required prior to the taking of a deposition under the provisions of Sections 474(1)-474(18).

On 3 June 1966, a due and proper notice was sent to counsel for petitioner by registered mail that the deposition of Jean Ruggerio would be taken at a specified time and place on 23 June 1966, in Berkeley Heights, New Jersey, before an officer authorized to administer oaths by the laws of New Jersey, for the purpose of discovery or for use as evidence.

The deposition was duly taken in accordance with the notice. The petitioner made no appearance, either by writing, by counsel, or in person.

Section 25 of Title 46, Code of Alabama 1940, found in Article 1 of said Title relating to the organization of the Bar of Alabama, provides that:

> " * * * the evidence of witnesses residing outside such county (county of residence of charged attorney) may be taken in the same manner as provided by law for the taking of depositions in civil cases." (Par. and Underlining ours.)

Likewise Rule 19, Section B of the Rules Governing the Conduct of Attorneys, also provides for the taking of depositions "in all respects as provided by law."

Counsel for petitioner in brief argues that:

> "There then exists serious doubt as to whether the Legislature could constitutionally make * * * Sec. 474(1), et seq., applicable to disbarment proceedings, and it is the position of defendant that to do so would violate his rights under Article 1, Section 6, of the Constitution of Alabama, 1901, and the Sixth Amendment, Constitution of the United States, as the same is made applicable to the State of Alabama by the Fourteenth Amendment."

This argument is succinctly answered by the following quotation from Ex parte Messer, 228 Ala. 16, 152 So. 244, a disbarment proceedings:

> "It is well settled that the rules and principles of the law of evidence applicable to civil proceedings are also applicable to quasi criminal proceedings; that the defendant may be compelled to testify as a witness for the plaintiff, the testimony may be taken by deposition, and the failure of the defendant to testify may be commented on in argument. Smith v. State, 13 Ala. App. 411, 69 So. 406; Miller v. State, 110 Ala. 69, 20 So. 392; Attorney General v. Pelletier, 240 Mass. 264, 134 N. E. 407."

Both Section 25, Title 46, Code of Alabama 1940, and Rule 19, Section B, existed prior to the enactment of Section 474(1), et seq. Each refers only generally to the taking of depositions in the manner provided by law. Section 474(1), et seq., is general concerning the taking of depositions. It will be regarded as adopting by reference, not only the law in force at the time of its enactment, but even later legislation if any, on the subject. See Carruba v. Meeks, 274 Ala. 714, 150 So. 2d 195.

We hold that the Board did not err in denying petitioner's motion to suppress Mrs. Ruggerio's deposition.

Assignment of error VII asserts error by the Board in denying petitioner's objection to Maultsby Waller's appointment by the President of the Alabama Bar as a commissioner to take testimony in the proceedings against the petitioner. The basis of the objection to Mr. Waller so serving was that he was a member of the Alabama Bar.

The interest relied on to disqualify must be a pecuniary one, and be affected by the event of the suit. Ex parte Bar Association, 92 Ala. 113, 8 So. 768. The Board did not err in overruling the objection to Mr. Waller to serve as commissioner to take testimony.

Assignment of error XIII relates to an alleged prejudicial argument made to the Board of Commissioners by Mr. Drayton Scott, representing the Bar, in the proceedings before the Board. Without passing upon whether Mr. Scott's argument exceeded permissible forensic boundaries, we note that it was stated by the presiding officer at the hearing that the Board had considered the matter and had voted to disregard the portion of the argument objected to, and sustained petitioner's objection.

To this, counsel for petitioner stated: "We will let it go at that."

In this state of the record, we find nothing to review. Assignment XIII we consider without merit.

Assignment of error IX is to the effect that the Board of Commissioners erred in overruling petitioner's motion to dismiss the complaint, as amended, against him.

Under this assignment, counsel for petitioner has argued a number of grounds assigned to the motion which we shall discuss in the order presented.

1. Rule 25, Section A, as amended, is invalid and being contrary to interpreted statutory law. Counsel for petitioner concedes that in order

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for a court of this state to have jurisdiction in divorce cases, one of the parties to the marriage must be domiciled in this state. Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236.

However, counsel argues that in a number of cases (Lutsky v. Lutsky, 279 Ala. 185, 183 So. 2d 782; Levine v. Levine, 262 Ala. 491, 80 So. 2d 235, and Multer v. Multer, 280 Ala. 458, 195 So. 2d 105), this court has denied relief to the party questioning the divorce because of laches or estoppel on the part of the questioning party.

Therefore, counsel contends, the presumption must be that a divorce decree is to all intents and purposes valid until otherwise determined by appeal and it is impossible to state with assurance whether any divorce decree is null and void until tested by appeal.

The fallacy of this argument is that Rule 25, Section A in no way departs from the applicable divorce statutes as to jurisdiction, nor the decisions thereunder, but reinforces these principles. Rule 25, Section A, as amended, was formulated by the Bar, and approved by this court in an effort to eliminate, or lessen, the scandalous "quickie divorce" racket with its local and national ramifications. It is an effort to regulate the ethical conduct of attorneys, and the validity or invalidity of a divorce decree, or the operation of laches or estoppel is beside the point. We find no merit in this contention.

2. Counsel argues that Rule 25, Section A, as amended, is violative of the due process and equal protection provisions of the United States Constitution. It is counsel's contention that the effect of Rule 25, Section A, as amended, is to unreasonably classify "divorce" attorneys separate and apart from other attorneys.

The rule attempts no classification. It merely condemns a practice already contrary to law. It makes crystal clear that no attorney will, in uncontested divorce cases, be permitted to practice fraud upon a court, his client, and society as a whole, by asserting facts of jurisdiction when the attorney knows, or reasonably should know, that no such jurisdictional facts exist.

Counsel also contends that by recognizing the state's interest in divorce matters, the courts are thereby merely continuing the interest of some religious views as to the indissolubility of marriage, thereby imposing religious views in the form of law, in violation of the First Amendment of the United States Constitution.

The fact that society as a whole, and religions, may both have interests in the continuation of marriages by no means violates any provision for the separation of church and state.

The interest of the church is basically an interest in the sanctity of marriage as a holy bond, while the interest of the state is basically materialistic, i.e., support of the wife and children and not casting them upon society for support, though admittedly many decisions in passing recognize the spiritual aspects of the marriage bond.

3. Counsel argues that the Grievance Committee which preferred charges against the petitioner was unlawfully appointed, in that it was appointed by the President of the Bar, rather than by the Board of Commissioners.

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Section 25, Title 46, Code of Alabama 1940, sets forth the broad powers of the Board of Commissioners. Paragraph (e) of the Section authorizes the Board to make rules and by-laws concerning the selection of committees and their powers and duties.

The Board of Commissioners on 5 April 1963, adopted a resolution that the members and terms of the Grievance Committee be fixed by the President. Such action by the Board was authorized by paragraph (f), supra. Authorizing the President to act in the premises merely permitted the President to advantageously perform for the Board a practical detail looking toward the administration of the duties cast upon the Board. No wrongful delegation of powers resulted in this situation.

4. Lastly, counsel for petitioner argues under this assignment that the officers of the Alabama Bar, other than the Board of Commissioners, are without power to act because the members of the Bar must attend the annual convention of the Bar in order to vote for such officials.

The requirement that members of the Bar must vote in person at the annual meeting of the Bar is one well within the administrative powers of the Bar. That some members of the Bar must travel longer distances than others to attend such annual meeting, violates no constitutional right.

Assignment of error XI relates to the action of Mr. Waller, the Commissioner to take testimony, in sustaining on 6 September 1966, petitioner's objection to the hearing being held in Montgomery

County Courthouse, and thereupon continuing the hearing until 1:00 P.M., and transferring the same to the Elmore County Courthouse.

It appears that on 5 August 1966, Mr. Waller was duly appointed Commissioner to take testimony as to the complaints against petitioner, the hearing to be held at Montgomery County Courthouse on 6 September 1966, at 10:00 A.M. The petitioner was served with notice of this hearing on 31 August 1966.

Petitioner and counsel appeared before Commissioner Waller at date set, 6 September 1966, and interposed an objection to the hearing in Montgomery County on the grounds petitioner was a resident of Elmore County. Appearing as a witness solely for the purpose of testifying as to his residence, the petitioner testified that he had maintained a law office in Montgomery County since 1962, though he had had his residence in Elmore County since 1961, and also had an office in his home. In the last election, he had voted in Elmore County. Commissioner Waller thereupon sustained petitioner's objection to the hearing being had in Montgomery County, and continued the hearing to 1:00 P.M., to be conducted in the Courthouse in Elmore County, some 18 miles distant. The petitioner had not subpoenaed any witnesses. At the beginning of the hearing in Elmore County, the petitioner objected to the hearing being had there.

Counsel for petitioner states in brief:

> "This is a question of power to act, not a question of exercise of judicial power to determine whether or not prejudice to the defendant resulted."

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Rule 13, Section B, provides that notice of hearing shall be given an accused attorney of the date fixed for the hearing at least five days prior to the date fixed. Notice of the hearing was given petitioner more than five days in advance.

Rule 15, Section B, provides that upon the day so fixed, the evidence shall be taken at the Courthouse of the county wherein the accused attorney resides.

The above provision is essentially a venue provision for the convenience of the accused attorney. Undoubtedly, it is a matter that could be waived. It in no wise goes to jurisdiction in its true sense to conduct the hearing. The petitioner had subpoenaed no witnesses for the hearing. Because of his objection, the hearing was moved to Elmore County for hearing later in the day. We find no probable injury to any substantial right of the petitioner in the action of Commissioner Waller in the premises.

Assignment of error 1 asserts that the Board of Commissioners erred in entering judgment of disbarment in that the legal evidence adduced is insufficient to support such judgment.

We have carefully read the record in this case and are clear to the conclusion that the legal evidence, and the reasonable inferences therefrom presented to the Board, is ample in its tendencies to support the resolution of guilt entered under

Charges five, six, seven, and nine, and to support the resolution of disbarment.

As we stated in In re McKay, 280 Ala. 174, 191 So. 2d 1:

> "An attorney must be accorded due process in disbarment and disciplinary proceedings, and the requirements of due process are met when the att rney is served with charges or specifications reasonably informing him of the charges against him and the at torney is thereafter accorded a hearing with an opportunity to defend. See 7 Am. Jur., supra, Sec. 64.
>
> "The above requirements of due process being met, formal and technical pleadings are not essential, nor do they have any place in a disbarment proceeding. In re Fite, 228 Ala. 4, 152 So. 246; McCord v. State, 220 Ala. 466, 126 So. 873; Ex parte Thompson, 228 Ala. 113, 152 So. 229, 107 A. L. R. 671; Ex parte Grace, 244 Ala. 267, 13 So. 178."

AFFIRMED.

All the Justices concur, except Lawson, J., not sitting.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

THOMAS W. SULLIVAN, Plaintiff	)	
vs.	)	CIVIL ACTION NO. 2820-N
ALABAMA STATE BAR, a corporate body, ET AL, Defendants.	)	

ON MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

Before RIVES, Circuit Judge, and JOHNSON and ALLGOOD, District Judges.

PER CURIAM:

This cause is submitted on a motion to dismiss and for judgment on the pleadings filed by the Chief Justice and Associate Justices of the Supreme Court of Alabama and on a like motion filed by the Alabama State Bar, its Board of Commissioners and Officers.

There can be little or no dispute about the pertinent basic facts as disclosed by the complaint. The Board of Commissioners of the Alabama State Bar was first established in 1923.[1/] The members in good

1/ Code of Ala. of 1940, Recompiled 1957, Tit.46, Sec.21, et seq. Later references to that statute will be simply to the pertinent section of Title 46.

standing of the Alabama State Bar in each judicial circuit of the State select one member of said Board of Commissioners. Sec. 22. Thus, there are 36 State judicial circuits and 36 members of the Board of Commissioners. There are wide variances among the judicial circuits both in total population and in the number of licensed lawyers.

At an annual meeting of the lawyers of Alabama held at such place and time as the Board of Commissioners designate and open to all members of the State Bar in good stand, a president and a first five-president of the State Bar are elected by majority vote by the members of the State Bar present and voting. Sec.24. Broad powers and authority are conferred on the Board of Commissioners, including the following:

"....(c) subject to the approval of the supreme court, to formulate rules governing the conduct of all persons admitted to practice, and to investigate, or cause to be investigated, and to pass upon, all complaints that may be made concerning the professional conduct of any person who has been, or may hereafter be, admitted to the practice of law; (d) subject to the approval of the supreme court, to formulate rules governing the reinstatement of members of the bar who have been disbarred, and to pass upon all petitions for re-instatement; (e) to appoint one or more committees from the membership of the board, or from the membership of the entire Bar, or partly from one and partly from the other....The board shall administer such discipline, by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom, as the case shall, in their judgment, warrant. A majority of the board shall constitute a quorum and the majority of those present (if a quorum be present) shall be empowered to act as and for the entire board. The supreme court may, and on petition of the party aggrieved must, in any case of suspension or dis-

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barment from practice, review the action of the board, and may, on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment." Sec. 25 (c), (d) and (e).

In May and June 1964, the Grievance Committee of the Alabama State Bar preferred charges against the plaintiff Sullivan, alleging violations of specified rules theretofore formulated by the Board and approved by the Supreme Court. Additional charges against Sullivan were preferred in 1966. On March 3, 1967, the Board of Commissioners found Sullivan quilty of certain of the charges and ordered his disbarment. Sullivan filed a petition in the Supreme Court of Alabama for certiorari and for a stay of execution of the judgment of disbarment. On March 13, 1967, the Supreme Court of Alabama entered the following order:

> "Petition, having filed in this Court on March 7, 1967, a Petition for Certiorari directed to the Board of Commissioners of the Alabama State Bar to forward to this Court a full and comp lete record of proceedings in this case and to review, revise, reverse and hold for naught that certain judgment of disbarment rendered by the Board of Commissioners of the Alabama State Bar on, to-wit: the 3rd day of March 1967, and Petitioner having filed a petition for stay of the execution of said judgment of disbarment pending this Court's determination of the matters to be presented, and said petition being duly submitted and examined and understood by the Court, it is ordered that the petition for stay be and the same is hereby denied;
>
> "Provided, however, that upon the Petitioner filing in this Court within ten days from this date a sworn affidavit stating that pending the disposition of this matter in this Court he will

not, directly or indirectly, either by himself or in association with another, act or appear as solicitor for complainant or respondent in any divorce proceedings now pending or hereafter filed, a stay of the order of disbarment of the Board of Commissioners of the Alabama State Bar will issue.

"Done this 13th day of March, 1967.

"Livingston, C.J., Lawson, Goodwyn, Merrill, and Harwood, J.J., concur.

"Simpson and Coleman, J.J. would grant a stay of execution of the judgment of disbarment, pending a review of the same, without condition as has here tofore been done in disbarment proceedings."

Sullivan's petition for reconsideration was ordered stricken. He unsuccessfully applied to the Honorable Hugh L. Black, Associate Justice of the Supreme Court of the United States for a stay of execution. Thereafter, he filed the prescribed affidavit, and the Supreme Court of Alabama, on April 3, 1967, issued the following order:

"WHEREAS, on March 13, 1967, this Court did enter an order denying the stay of execution of the judgment of disbarment entered by the Board of Commissioners on March 3, 1967, and

'WHEREAS, petitioner did, on March 28, 1967, file an affidavit called for in the Court's order of March 13, 1967, and through his attorney has petitioned the Court to treat such affidavit as being timely filed in view of the fact that petitioner sought relief in the Supreme Court of the United States by petition, and said petition being denied by Mr. Justice Hugo L. Black on March 24, 1967,

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"NOW, THEREFORE, IT IS ORDERED that the judgment of disbarment entered by the Board of Bar Commissioners on March 3, 1967, be and the same is hereby stayed pending the disposition of the PETITION FOR REVIEW in this Court."

The petition for review of Sullivan's disbarment was argued and submitted to the Supreme Court of Alabama in May 1968, and on January 30, 1969, that Court rendered its opinion and decision affirming the judgment of disbarment.

On November 15, 1968, before the disposition of the petition for review, the President of the Board of Commissioners and the General Counsel of the Alabama State Bar filed in the Supreme Court of Alabama a petition for an order to show cause why Sullivan should not be held in contempt of court for participating in certain named divorce actions. On December 11, 1968, an order to show cause issued from the Supreme Court of Alabama and the date set for hearing was Wednesday, January 8, 1969.

On January 3, 1969, Sullivan filed his complaint in this Court praying for a restraining order, interlocutory injunction and permanent injunction restraining further prosecution or consideration of the contempt proceeding against Sullivan. On the same day, the district judge denied Sullivan's motion for a temporary restraining order. The contempt proceeding is now set for hearing before the Supreme Court of Alabama on February 24, 1969.

Sullivan injects federal constitutional questions by seeking an injunction restraining the enforcement of Sections 22 and 24 of Title 46 of the Code of Alabama. He claims that Section 22 violates the equal protection clause of the Fourteenth Amendment be cause of malapportionment of the Board of Commissioners arising from the wide disparity in population and in numbers

of lawyers in the various State judicial circuits. He attacks Section 24 as denying the equal protection of the laws, because he and other lawyers are required to travel great distances and markedly different distances from their respective homes or places of practice in order to vote for a president and a first vice-president of the State Bar. Sullivan had made these same attacks as a part of his defense in the disbarment proceeding, and in affirming the judgment of disbarment the Supreme Court of Alabama ruled adversely to Sullivan on these questions.

In addition to individual relief as a defense to the contempt proceeding, Sullivan appears in this Court individually and as a champion of the entire State Bar - "on behalf of himself and all other members in good standing of the Alabama State Bar" - and prays: "That in the event the constitutional deficiencies inherent in the Alabama State Bar as now constituted are not remedied forthwith that the Court proceed to correct the deficiencies."

The foregoing statement of this case has necessarily been disproportionately long, and its decision can be relatively brief.

28 U.S.C. Section 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 2/

2/ See Dombrowski v. Pfister, 1965, 380 U. S. 479, 484 n. 2.

The Second Circuit[3/] and the Fifth Circuit [4/] apparently differ as to whether this statute is a clear cut prohibition or establishes only a rule of comity or judicial discretion. Under either construction, it is clear that this Court should not interfere by injunction with the pending contempt proceeding in the Supreme Court of Alabama. [5/] Proceedings to disbar attorneys from practice in the Alabama Courts are peculiarly within the jurisdiction of the Supreme Court of Alabama, free from federal interference.

3/ Stevens v. Frink, 2 Cir.1967, 372 F.2d 378,381 382.

4/ Southern California Petroleum Corp. v. Harper, 5 Cir.1960, 273 F.2d 718; T. Smith & Son, Inc. v. Williams, 5 Cir. 1960, 275 F.2d 397; Dilworth v. Riner, 5 Cir. 1965, 343 F.2d 226.

5/ See Douglas v. City of Jeannette, 1943, 319 U. S. 157, 162; Zwickler v. Koota, 1967, 389 U.S.241, 253; Cameron v. Johnson, 1968, 390 U.S. 611.

6/ See Theard v. United States, 1957, 354 U. S. 278, 281; Gately v. Sutton, 10 Cir. 1962, 510 F. 2d 107.

Sullivan seems to take the position that this case is brought within one of the exceptions to 28 U.S.C. Section 2283, quoted supra, vis.: "... where necessary in aid of its jurisdiction"; and that this Court should prevent or delay his disbarment so that he may continue this suit to correct the constitutional deficiencies which Sullivan claims to be inherent in the Alabama State Bar as now constituted.

There may be several inadequacies of this case as a class action under Rule 23, Fed. R.Civ.P. Certainly the "class" is not properly described as "all members in good standing of the Alabama State Bar," for that includes the beneficiaries as well as the victims of the alleged discrimination. It is doubtful whether a lawyer against whom disbarment proceedings are pending is a "representative party" who can be counted on to "fairly and adequately protect the interests of the class." Rule 23(a), Fed.R.Civ.P. Since these possible inadequacies have not been raised by the defendants, we will treat this as a proper class action for purposes of the present decision.

Assuming that Sullivan had standing either individually or as representative of a class to prosecute this action when the present complaint was filed, we would have some doubt as to whether that standing was lost by the Alabama Supreme Court's subsequent affirmance of the judgment of disbarment, 7/ or will be lost by

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7/ That affirmance does not conclude the litigation, for by supplemental brief Sullivan's counsel informs this Court: "It may be stated that a petition for rehearing shall be filed in the Supreme Court of Alabama within the fifteen (15) day period allowed by the rules of that Court." Of course review may also be sought from the Supreme Court of the United States.

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any judgment that may be entered by the Supreme Court of Alabama in the contempt proceeding.[8/]

8/ See Davis, Standing: Taxpayers and Others, 35 U. Chi. L.Rev.611, 612 (Summer, 1968); 3 Davis, Administrative Law Treatise Sections 22.01 - 22.18. That much is conceded in brief by the Alabama State Bar, its Board of Commissioners and officers:

"If this Court views plaintiff's constitutional challenge to the organization of the Bar Commission as raising a substantial question meriting review by this Court, or one which is inappropriate for judgment on the pleadings, we point out that Mr. Sullivan would have clear standing to raise this constitutional challenge as an attorney in the State of Alabama even if the Supreme Court of Alabama upheld his disbarment. This would be true be cause as a disbarred attorney, plaintiff Sullivan's interest in the Bar Association would not be merely academic. Under Title 46, Section 25, Alabama Code, the Bar Commission is charged with formulating the rules governing the reinstatement of disbarred members of the Bar, subject to the approval of the Supreme Court. Also the Bar Commission is charged with the duty 'to pass on all petitions for reinstatement.' It thus seems clear that even if a member of the general public is viewed as lacking standing to challenge the constitutional formation of the Bar Commission, a disbarred lawyer would have such standing."

In any event a class action cannot be dismissed without the approval of the court and after notice of the proposed dismissal to all members of the class.[9] If that occurs, we cannot assume that every other member of the class will fail to intervene to correct "the constitutional deficiencies in the Alabama State Bar as now constituted," if in truth there by substantial grounds to believe that there are any such constitutional deficiencies. Thus Sullivan's continued presence as plaintiff is not shown to be "necessary" in aid of this Court's jurisdiction.[10] We conclude that this case does not come within any of the exceptions to 28 U.S.C. Section 2283, and that this Court should not grant an injunction to stay the contempt proceedings in the Supreme Court of Alabama.

The appropriateness of declaratory relief rests in the sound discretion of this Court.[11] Out of an abundance of caution and from considerations of public policy, we will assume that Sullivan has properly invoked the jurisdiction of this Court and that, having done so, we are required to consider his federal constitutional claims.[12]

9/ Rule 23(e), Fed.R.Civ.P.

10/ 28 U.S.C. Section 2283.

11/ Eccles v. Peoples Bank of Lakewood Village, Calif., 1948, 333 U.S. 426; Zwickler v. Koota, 1967, 389 U.S. 241.

12/ See England v. Louisiana Medical Examiners, 1964, 375 U. S. 411, 415.

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The Supreme Court of Alabama has held that in reviewing disbarment proceedings "this Court is in the exercise of its original and inherent powers in the matter of disbarment of attorneys at law."[13/] The powers conferred upon the Board of Commissioners of the Alabama State Bar are more judicial than legislative in nature. They were so treated by the Supreme Court of Alabama in the leading case of Ex parte Thompson, 1933, 152 So. 229, 238, 239:

> "We will now address outselves to a consideration of the question whether the Legislature of Alabama acted within constitutional bounds in in creating the board of commissioners of the state bar, and in conferring upon it the powers enumerated in the act. No doubt it was attempted to confer upon the board thus created powers highly judicial in nature. This board is given authority to formulate rules governing the conduct of all persons admitted to practice and to investigate and pass upon all complaints that may be made concerning the professional conduct of any person who has been or who may hereafter be admitted to the practice of the law, and to formulate rules governing the reinstatement of members of the bar who have been disbarred and to pass upon all petitions for reinstatement. The board is empowered to provide for the taking of evidence, and, on hearing of any complaint against an accused attorney, in all cases in which the evidence, in the opinion of a majority of the board, justifies such a course, they are required to take such disciplinary action by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom, as the case shall

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13/ Ex parte Denson, Ala. 1938, 178 So. 484.

in their judgment warrant, provided that in cases of exclusion and disbarment a majority of the board shall vote affirmatively before the exclusion and disbarment shall become effective. But the rules and regulations which may be formulated and adopted by the board shall not become effective until the same shall have received the approval of this court, and the right of this court to approve or disapprove all or any part of the rules so formulated and adopted by the board is fully reserved to this court. More than this, this court is expressly given the right to review on petition of party aggrieved, the action of the board, and may, on its own motion, and without the certification, inquire into the merits of the case, and take any action agreeable to their judgment. If this court should desire it, additional testimony may be taken.

"Section 139 of the Constitution, as presently pertinent, reads:

"'The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature.* * *' (Italics supplied.)

"Thus we find express constitutional warrant for conferring upon this board judicial functions; and this conclusion is supported by the decision of this court in the case of State Tax Commission v. Bailey & Howard, 179 Ala. 620, 60 So. 913. We fail to see, in the creation of the board of commissioners of the state bar with the powers

conferred, any transgression of constitutional bounds by the Legislature, and, as for any constitutional objections assigned, and here argued, we hold that the act does not violate any of the provisions of the Constitution urged and assigned by appellant."

This it appears that the State Supreme Court, in the exercise of its original and inherent powers in disbarment proceedings, can remedy any errors committed by any claimed malapportionment of the Board of Commissioners. Moreover, assuming any such malapportionment to exist, the acts of the Board of Commissioners are nonetheless acts of a de facto authority and valid.[14/]

Finally, this case might be more briefly and properly disposed by laying aside all procedural obstacles and deciding Sullivan's federal constitutional claims. He asks this Court to extend the "one man, one vote" requirement far beyond the holdings of the Supreme Court in Reynolds v. Sims, 1964,

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14/ Cassius Marsellus Clay, Jr. v. United States, 5 Cir. 1968, 397 F.2d 901; Nelloms v. United States, 5 Cir. 1968, 399 F.2d 295; Sellers v. McNamara, 5 Cir. 1968, 398 F.2d 893; Simmons v. United States, 5 Cir. 1969, _____F.2d ____(No.25371, decided Jan 9, 1969); Schaefer v. Thomson, D. Wyo., 251 F.Supp. 450, 453, aff'd, Harrison v. Schaefer, 1966, 383 U. S. 269; Ryan v. Tinsley, 10 Cir. 1963, 316 F.2d 430, 432; Dawson v. Bomar, 6 Cir. 1963, 322 F.2d 445; Horton v. Bomar, 6 Cir. 1964, 335 F.2d 583; Sims v. Frink, M.D. Ala. 1962, 208 F.Supp. 431, aff'd, Reynolds v. Sims, 1964, 377 U.S. 533; Fortson v. Morris, 1966, 385 U. S. 231, 235.

377, U. S. 533, and Avery v. Midland County, Texas, 1968, 390 U.S. 474, 88 S.Ct. 1114. The Supreme Court has held that the "one man, one vote"principle has no relevancy to the choice of members of a county school board, a non-legislative office.[15] Lower courts have reached the same result as to various governing bodies of limited-purpose districts and as to members of the executive or judicial branch.[16] As has been indicated, the powers of the Board of Commissioners here under attack may more accurately be classed as judicial than as legislative. If there is any unjust malapportionment, it can be corrected by the State Legislature, which itself is no longer afflicted with the malady of malapportionment.[17] We hold that the constitutional principle of "one man, one vote" has no relevancy to the Board of Commissioners of the Alabama State Bar.

Sullivan's attack on Section 24 does not, in our opinion present a substantial constitutional question. It is elementary that the equal protection clause of the Fourteenth Amendment is aimed only at unreasonable or invidious differences.[18] The presumption is that discriminations in state legislation are based on adequate grounds.[19] In the light of all of the

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15/ Sailors v. Board of Education, 1967, 387 U.S.105, 111.

16/ See Annotation on Applicability of "One Man - One Vote" Rule, 18 L.ed.2d 1537, 1541, 1543.

17/ See Sims v. Frink, M.D. Ala.1962, 208 F.Supp. 431, aff'd, Reynolds v. Sims, 1964, 377 U.S.533; Sims v. Baggett, M.D. Ala. 1965, 247 F. Supp. 96.

18/ Lindsley v. Natural Carbonic Gas Co., 1911, 220 U. S. 61.

19/ Middleton v. Texas Power & Light Co., 1919, 249 U. S. 152, 157; Madden v. Kentucky, 1940,309 U.S.83.

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advantages which flow from a face-to-face discussion of the many problems confronting the organized bar, the Alabama Legislature clearly acted within its constitutional power in requiring an annual meeting of the integrated State Bar for the purpose of electing a president and vice-president.

Accordingly, it is the order, judgment and decree of this Court that each of the motions of the defendants to dismiss be and the same is hereby granted, and the complaint is hereby dismissed. The costs are taxed against the plaintiff.

Done this the 4th day of February 1969.

s/Richard T. Rives
United States Circuit Judge

s/Frank M. Johnson, Jr.
United States District Judge

s/Clarence W. Allgood
United States District Judge

APPENDIX

B-1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

I.

Rule 8, Revised Rule of the Supreme Court of the United States

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of a majority of the justices participating.

II.

Rule 46 (b), Federal Rules of Appellate Procedure

(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he

should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

III.

Article 6, Section 139, Constitution of Alabama, 1901

Section 139. The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature; but no court of general jurisdiction, at law or in equity, or both, shall hereafter be established in and for any one county having a population of less than twenty thousand, according to the next preceding federal census, and property assessed for taxation at a less valuation than three million five hundred thousand dollars.

IV.

Title 46, Section 33, Code of Alabama, 1940

Discipline; prosecution and procedure. The board of commissioners shall establish rules governing procedure in cases involving alleged professional misconduct of members of the state bar. The grievance committee of the Alabama

state bar, or the grievance committee of a circuit county or city association, established or approved by the Alabama State Bar, or its board of commissioners, shall have the power and authority to investigate any alleged professional misconduct of a member of the state bar, whether or not charge or complaint therefor be made or referred to it, and to report its findings or recommendations to the board of commissioners, or to prefer complaint or charge thereon against the accused attorney at law before the board of commissioners for trial thereof, and to prosecute to decision the said complaint or charge before the board of commissioners, and the duty is imposed upon said board of commissioners of considering such findings or recommendations, and of hearing and determining such complaint or charge. Such grievance committee is hereby empowered to take testimony under oath in any such investigation, or the board of commissioners or such grievance committee may designate any person as commissioner to take testimony under oath in any such investigation whose compensation for the services so rendered may be fixed and ordered paid by the board of commissioners at its discretion. Such board of commissioners or any member thereof of such grievance committee or any member thereof shall not be required to give any security for costs and shall not be liable for any costs or damages to the accused attorney incident to such investigation, report, complaint, charge, prosecution or trial. The board of commissioners may appoint counsel to prosecute before it any such complaint or charge so preferred before it against an attorney, and may within its discretion fix and order paid reasonable compensation for the services so rendered by such counsel. And it shall be the duty of the sheriff

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of the state or of any lawful officer thereof to serve such writs, subpoenas, or other papers in connection with the investigation, hearing and determining of such complaint or charge as may be placed in his hands by said board of commissioners or said grievance committee or any person designated hereunder as commissioner to take testimony in such investigation or any counsel appointed by the board of commissioners to prosecute before it such complaint or charge or the accused or his or her attorney; subpoenas, writs or other papers hereunder may be served by sending copies thereof to the proper parties by registered mail and the return receipts of such writs, subpoenas or other papers, signed by the party to be served, shall be construed to be as personal, sufficient and legal service of all such writs, subpoenas or other papers.

V

Rule 37, Section A, Rules Governing The Conduct of Attorneys in Alabama

A member of the State Bar shall not appear on behalf of a client before a public officer, board, committee or body, or any member thereof, that he is an attorney representing such client.

Any attorney who shall do or be guilty of any of the acts forbidden or prohibited by any of the foregoing rules of Section (A) hereof may be the subject of disciplinary action by public or private reprimand or by suspension from the practice of law or by exclusion and disbarment therefrom.

An attorney must be disbarred and excluded from the practice of law for any one of the following causes:

(a) When any judgment is rendered against him for money collected by him as attorney upon which judgment an execution has issued and been returned no property, in which case the record of the judgment and execution or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence, unless such judgment has been set aside, reversed, or annulled.

(b) Upon his being convicted under a plea of guilty, a plea of not guilty, a plea of nolo contendere or any other plea by any Court of record of this State or of the United States or of any other State of any crime which by the law of the forum trying the case is a felony, in either of which cases the record of his conviction or a copy thereof certified and authenticated in the manner authorized by law is conclusive evidence.

But no attorney shall be subject to disciplinary measures for any action on his part who, prior to such action, has received from the Grievance Committee its written opinion that such action was justifiable or permissable.

VI

Rule 3, Section B, Rules Governing The Conduct of Attorneys in Alabama

It shall be sufficient for any complaint against any attorney to charge in writing that such an attorney has violated or failed to comply with one or more of the rules, referring to such rule or rules by the numbers hereinbefore set forth, and such specification of the conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of.

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VII

Rule 22, Section B, Rules Governing The Conduct of Attorneys in Alabama

The rules of evidence and the degree of proof applicable to civil cases shall apply in all cases before the Board.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1518

J. ROBERT HUIE,

Petitioner

vs.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,

Respondent

PETITION FOR REHEARING

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, J. ROBERT HUIE, prays that he be granted a rehearing in this cause to review the order or judgment of the Supreme Court of the United States of June 22, 1970, which denied to him a writ of certiorari to be issued out of and under the seal of this Court to review the judgment of the Supreme Court of Alabama entered on January 8, 1970, which judgment resulted in the disbarment of petitioner by way of affirmance of an order of the Board of Commissioners of the Alabama State Bar on March 3, 1967.

JURISDICTION

This petition is submitted pursuant to Rule 58(2), Rules of the Supreme Court of the United States, 1967.

ADDITIONAL AND ENLARGED SUBSTANTIAL QUESTION PRESENTED

In disbarment proceedings, does an evidentiary standard utilized by the trier of fact of being "reasonably satisfied" from the evidence comport with that due process guaranteed by the Fourteenth Amendment, United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED

That portion of the Fourteenth Amendment, United States Constitution, Section 1, as follows:

"***nor shall any State deprive any person of life, liberty, or property, without due process of law;***"

ADDITIONAL STATEMENT OF THE CASE

The substantial question stated above, and which was merely sketched in on the original petition for writ of certiorari (G, pp. 23-24), must be placed in the proper context relative to disciplinary proceedings in Alabama.

Section B, Rules Providing a Method of Procedure to be Followed in the Investigation and Trial of Complaints Concerning the Professional Conduct of Attorneys in Alabama, provides (Rule 22):

"DEGREE OF PROOF REQUIRED

> "The rules of evidence and the degree of proof applicable to civil cases shall apply to all cases before the Board." (*i.e.*, The Board of Commissioners of the Alabama State Bar, the original trier of fact.)

The Board of Commissioners of the Alabama State Bar in entering its judgment of disbarment did not state what, if any, qualtitative standard of proof was utilized in its

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determination that petitioner was guilty of all charges presented against him by the Grievance Committee of the Board.

The Supreme Court of Alabama, however, did in its opinion (Appendix, p. All) clearly state:

> "From the evidence summarized above, we are *reasonably satisfied* that George E. Anderson was a resident of New Jersey and was not a resident of Alabama in December, 1964, ***"
>
> "The finding stated above is sufficient to support the judgment of guilt on Charges 7, 8, and 9, and the punishment of disbarment."

An examination of Charge Eight is now most pertinent:

CHARGE EIGHT
(Violation of Rule 16, Section A)

> "On, to-wit, January 27, 1965, the said attorney did submit to the Circuit Court, Tenth Judicial Circuit of Alabama, a divorce case, namely *George E. Anderson vs. Loretta A. Anderson*, in Equity, Case No. 137-515, wherein the Bill of Complaint and deposition of complainant represented to the Court that Complainant was a bona fide resident of the State of Alabama, when, in truth and in fact, the said attorney knew that neither the complainant nor the respondent was a bona fide resident of the State of Alabama.
>
> "The Grievance Committee charge that in doing the above described acts, the said attorney was guilty of violating or failing to comply with Rule 16, Section A of the Rules Governing the Conduct of All Persons Admitted to the Practice of Law in the State of Alabama, said Rule providing:
>
> > 'No person heretofore or hereafter admitted to practice law in Alabama, shall . . .

> '16. Introduce or offer to introduce any testimony which he knows to be false or forged'."

The criminal statutes of Alabama are explicit in regard to the matters delineated in this Rule:

"Title 14, Section 377, Code of Alabama, 1940:

> "Perjury and subornation in other cases.
>
> "Any person who wilfully and corruptly swears or affirms falsely, or corruptly procures another to so swear or affirm, in regard to any material matter or thing, upon any oath or affirmation authorized by law, except on the trial of any person under an indictment for a felony, shall, on conviction, be imprisoned in the penitentiary for not less than two nor more than five years."

In his Application for Rehearing presented to the Supreme Court of Alabama, petitioner stated that "the entry of said judgment *** was *** a denial of that due process guaranteed by the Fourteenth Amendment, United States Constitution."

Petitioner J. ROBERT HUIE submits the question of evidentiary standards in disciplinary proceedings conducted by a State was properly raised below.

REASONS FOR GRANTING REHEARING

A.

EVIDENTIARY STANDARDS IN DISBARMENT PROCEEDINGS SHOULD OF CONSTITUTIONAL RIGHT BE HIGHER THAN THOSE APPLICABLE TO CIVIL PROCEEDINGS

At the time of the preparation and submission of the petition for writ of certiorari to this Court, petitioner J.

ROBERT HUIE was not fully cognizant of In the Matter of *Samuel Winship,* US (Decided March 31, 1970).

There are striking parallels in the factual bases of that case and the one at bar.

Juvenile delinquency hearings are not denominated "criminal"; and we may concede *arguendo* that a disbarment proceeding is not "criminal". It is noted, however, that the Supreme Court of Alabama stated that disbarment is punishment, with which characterization petitioner is in wholehearted accord.

In both *Winship* and the case at bar, as has been noted, the one proceeded against was accused basically of a criminal act. That act here was forgery or subornation of perjury, as was spelled out in Charge Eight.

Furthermore, petitioner notes that higher evidentiary standards than those applicable to civil cases may also apply to proceedings which, in essence, do not involve any criminal aspect whatsoever, but only a moral one. See *Woodby v. Immigration and Naturalization Service,* 385 US 276.

Petitioner J. ROBERT HUIE, therefore, argues as follows from *Winship:*

(1). The characterization of disbarment proceedings as "civil" or "quasi-criminal", etc., does not dispense with the application of due process standards.

(2). Where a criminal act is the basis of charges in such a "civil" proceeding, then the due process evidentiary standard to support a finding of guilt on such charges is proof beyond a reasonable doubt.

As to Charge Eight brought against petitioner J. ROBERT HUIE, it is patent that its basis was the criminal concept of perjury or subornation of perjury. The rule governing the qualitative standard of proof in such a case in Alabama is the civil rule, which rule was applied by the

Supreme Court of Alabama in making its finding of "guilty" on Charge Eight.

A distinction between *Winship* and the case at bar, which is apparent, is that in *Winship* there was an incarceration of the juvenile. Here the punishment was disbarment. It seems ultimately right, and constitutionally right, and which petitioner J. ROBERT HUIE does not hesitate to state, that this distinction is not a difference, so that, on this basis, a consideration of the problem could be avoided.

It can be emphazied further that the due process clause of the Fourteenth Amendment, United States Constitution, protects the loss of property as well as the loss of liberty. Those courts which have written to the concept of the right to practice law have recognized that the right is one constitutionally protected, *e.g.*, In re *Schlesinger*, 404 Pa 584, 182 A2d 835, 840 (1963), and within the concept of due process.

Furthermore, although the New York statute involved in *Winship* specifically stated a determination of juvenile delinquency did not affect any right to obtain any license, which is taken to mean that it could not be used, for instance, in denying a license to practice law, here in the case at bar, the determination of the criminal aspects under Charge Eight specifically resulted in the loss of the right to practice law. Thus, while there is not present any loss of liberty, there is an immediate loss of property. To be utterly realistic, disbarment is, in almost all cases, a more severe punishment than imprisonment, entailing, as it does, a public stigma of one not usually within the penumbra of criminal activity.

CONCLUSION

Given *Winship*, the full text of the due process clause of the Fourteenth Amendment, United States Constitution, and the actual operation of the judgment of the Supreme Court of Alabama, it is submitted sufficient grounds have been presented to the Court for the granting of a rehearing of its denial of the petition for writ of certiorari, and, also, the granting of the petition itself.

Respectfully submitted,

FRED BLANTON, JR., Esq.
Suite 1627
Twenty-One Twenty-One Building
Birmingham, Alabama 35203

Of counsel for Petitioner

CERTIFICATE

I, FRED BLANTON, JR., of counsel for J. ROBERT HUIE, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay; and I further certify that the foregoing petition for rehearing is restricted to the grounds specified in the petition.

This the 10th day of July, 1970.

FRED BLANTON, JR., Esq.
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Birmingham, Alabama 35203
Of counsel for Petitioner